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No.

In The

Supreme Court of the United States

October Term, 1994

FOREST GROVE, INC., *et al.*,

Petitioners,

vs.

RESOLUTION TRUST CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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127 pp

QUESTIONS PRESENTED

1. Whether state law provides the rule of decision to a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b) which seeks to strike and/or open a judgment entered by confession in federal court?

2. Whether the failure to follow state law requirements for a confessed judgment violates the judgment debtor's procedural due process rights rendering the confessed judgment, entered in federal court, void *ab initio*?

LIST OF PARTIES

Petitioners in this Court are Forest Grove, Inc., Ron Isenhart, and Delores A. Isenhart.

Respondent is the Resolution Trust Corporation, as receiver of Hill Financial, S.A.

LIST PURSUANT TO RULE 29.1

Petitioner Forest Grove, Inc. is a privately-held Delaware corporation with no parent companies or subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on August 26, 1994.

OPINIONS BELOW

The opinion of the District Court denying Petitioners' Motion for Relief from Judgment is reported at 1993 WL 349429

and appears in the Appendix at 27a.[1] The opinion of the Court of Appeals affirming in part and reversing in part the District Court opinion is reported at 33 F.3d 284 and appears in the Appendix at 1a.

STATEMENT OF JURISDICTION

The opinion and order of the District Court denying Petitioners' Motion for Relief from Judgment were entered September 8, 1993. App. 38a. The judgment and opinion of the Court of Appeals were entered August 26, 1994. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(a).

RULES INVOLVED

Rule 60(b) of the Federal Rules of Civil Procedure, and Rules 2951, 2952 and 2959 of the Pennsylvania Rules of Civil Procedure appear at Appendix D, 88a.

STATEMENT OF THE CASE

A. The Judgment by Confession.

On November 25, 1992, judgment by confession in the amount of $1,656,266.08 plus costs and interest was entered in favor of the Resolution Trust Corporation ("RTC"), as receiver of Hill Financial, S.A. ("Hill Financial") and against Forest Grove, Inc. ("Forest Grove"), Ron Isenhart and Delores A. Isenhart. App. 45a. The RTC became the receiver of Hill Financial pursuant to an order of the Office of Thrift Supervision on October 12, 1989. App. 40a.

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1. Citations to "App." are to the Appendix to this Petition and to "R." to the Appendix filed in the Court of Appeals.

The confession of judgment arose from a commercial loan issued by Hill Financial to Forest Grove. On October 1, 1986, Hill Financial had agreed to fund the construction of a mobile home park in Delaware which would be owned and operated by Forest Grove. App. 60a-61a, ¶ 5. Hill Financial agreed to loan $1,815,000 to Forest Grove for the completion of 167 mobile home lots at the park. At the time of the loan, there were 50 fully developed mobile home lots, 48 partially developed mobile home lots, and 69 undeveloped mobile home lots. App. 78a-79a. Hill Financial initially released $640,484 to Forest Grove with the balance of the loan to be escrowed and disbursed as spaces were completed and leased up to achieve "stabilized value." R. 74. Hill Financial did not define "stabilized value." Hill Financial eventually advanced only approximately $1,210,000 (of which $235,000 was interest reserve). App. 52a, ¶ 23.

Forest Grove, in reliance of the loan commitment made by Hill Financial, acquired the park and began its completion. Forest Grove was able to complete the development of the 48 partially developed lots. Beginning in 1988, Forest Grove requested Hill Financial to lend the balance of the committed funds in order for the project to be completed. After repeated requests by Forest Grove, Hill Financial finally refused to advance any further funds in the Fall of 1989. App.61a, ¶ 8. Since completion of all 167 sites was necessary to make the project feasible and to allow Forest Grove to pay back the loan, the refusal of Hill Financial to release the balance of the loan to complete the project prevented to project from becoming successful. *Id.* Since the refusal of Hill Financial to advance the balance of the loan, the regulation of on-site sewer systems affecting the park have changed, preventing the completion of the remaining 69 lots at the park. App. 61a-62a, ¶9.

On November 20, 1992, the RTC filed a Complaint for confession of judgment, asserting that the District Court had jurisdiction pursuant to 12 U.S.C. § 1441a(1) (1). App. 40a, ¶ 1.

The District Court also had jurisdiction pursuant to 29 U.S.C. § 1331. The Complaint sought to confess judgment on the basis of a Bond and Warrant executed by Forest Grove and averred that such confession of judgment was authorized in Pennsylvania. App. 41a, ¶ 6. The Complaint also sought to confess judgment against Mrs. Isenhart and Mr. Isenhart on the basis of a November 12, 1986 Suretyship Agreement allegedly executed by them. App. 42a, ¶ 14. While a copy of the Suretyship Agreement had been attached as an exhibit to the Complaint, it did not contain Mrs. Isenhart's signature. Rather, the Suretyship Agreement was signed by Mr. Isenhart on behalf of Mrs. Isenhart as her purported attorney-in-fact. R. 30. The Complaint did not contain Mrs. Isenhart's signature, nor did it contain any allegation or exhibit alleging that Mr. Isenhart had any authority to sign the Suretyship Agreement containing a confession of judgment clause on behalf of Mrs. Isenhart.

B. The Motion for Relief from Judgment.

On January 12, 1993, Forest Grove and the Isenharts filed a Motion for Relief from Judgment Pursuant to Rule 60 of the Federal Rules of Civil Procedure. App. 46a.

Mrs. Isenhart sought to have the judgment *stricken* on the basis that she did not execute the Suretyship Agreement and that the Complaint did not contain, nor even allege the existence of, a power of attorney duly executed by Mrs. Isenhart granting Mr. Isenhart authority to authorize a confession of judgment against her. App. 48a, ¶ 6. Mrs. Isenhart also alleged that the judgment must be stricken since Pennsylvania Rule of Civil Procedure 2952(b) was a substantive rule which required the Complaint to contain a copy of Mrs. Isenhart's signature or an explanation of why a copy of her signature was unavailable. App. 48a-49a, ¶ 7.

Forest Grove and the Isenharts sought to have the judgment

opened on the basis that Hill Financial breached the loan agreement by failing to lend to Forest Grove the full amount of the loan. App. 52a-56a, ¶¶ 21-41. They alleged that the failure to lend the balance of the loan was a failure of consideration which was sufficient to require the judgment be opened. Hill Financial had collected commitment fees for the total amount of the loan. App. 52a, ¶ 22. Hill Financial produced no evidence explaining the term in the loan commitment letter which states that the balance of the loan funds are to be "disbursed as spaces are completed and leased up to achieve the 'stabilized value'." App. 84a.

C. The District Court's Ruling.

After oral argument on Petitioners' motion, the District Court denied Petitioners' motion. App. 38a. The District Court noted that relief "under Rule 60(b) should be granted only in *exceptional* circumstances." App. 30a. (emphasis supplied). The District Court also held that a confessed judgment should only be set aside if facts were alleged which, if established at trial, would constitute a meritorious defense. App. 30a-31a. The District Court did not consider the substantive law of Pennsylvania regarding the opening and striking of confessed judgments.

The District Court rejected Mrs. Isenhart's argument that the judgment must be stricken either because she did not authorize a confession of judgment or because her signature was not attached to the Complaint. 31a-33a. The District Court found that the power of attorney executed by Mrs. Isenhart was sufficiently broad to permit Mr. Isenhart to authorize a confession of judgment against Mrs. Isenhart and that such a power of attorney indicated a knowing and intelligent waiver by Mrs. Isenhart of her due process rights. App. 33a. The District Court rejected Mrs. Isenhart's argument that her signature must be attached to the Complaint as required by Pa. R. C. P. 2952(b). App. 36a.

The District Court also rejected the Petitioners' argument that Hill Financial's failure to fund the balance of the loan was a failure of consideration warranting the opening of the judgment. App. 35a. The District Court found that Hill Financial never agreed to pre-fund the mobile home construction project. App. 35a.

D. The Court of Appeals' Affirmance in Part, Reversal in Part.

The Court of Appeals determined that the District Court did not err in applying federal common law instead of Pennsylvania law to determine whether a meritorious defense was presented. App. 18a. This issue is of critical importance to the determination of whether the Petitioners presented sufficient evidence in support of their defense of failure of consideration.

Even though the District Court did not utilize Pennsylvania's standard in opening a judgment, the Court of Appeals held the District Court did not abuse its discretion in finding no failure of consideration. App. 22a. Importantly, the Court of Appeals stated that the "record could not support a finding that Hill [Financial] breached" the loan commitment. App. 22a. The Court of Appeals, in upholding the District Court's rejection of the failure of consideration defense, did not fully analyze the language of the loan commitment, omitting a key conditional clause. Specifically, the Court of Appeals held that the language "as spaces are completed and leased up" was not ambiguous. *Id.* However, the complete provision challenged by Petitioners as both ambiguous and as failing to create a condition precedent states that the loan would be disbursed "as spaces are completed and leased up *to achieve the 'stabilized value'*." App. 84a. (emphasis supplied).

Regarding Mrs. Isenhart's request to strike the judgment, the

Court of Appeals determined that the power of attorney did not empower Mr. Isenhart to authorize a confession of judgment against Mrs. Isenhart and reversed the District Court's refusal to open the judgment as to Mrs. Isenhart. App. 25a-26a. The Court of Appeals did not address the other arguments raised by Mrs. Isenhart.

REASONS FOR GRANTING THE WRIT

The drastic nature of the Pennsylvania confession of judgment system was noted by this Court in *Swarb v. Lennox*, 405 U.S. 191, 195 (1972). The Pennsylvania Supreme Court has stated that confessions of judgment are "perhaps the most powerful and drastic document known to civil law." *Cutler Corp. v. Latshaw*, 374 Pa. 1, 4, 97 A.2d 234, 236 (1953). It has equated the signing of a confession of judgment "to a warrior of old entering a combat by discarding his shield and breaking his sword." *Id.*

The last time this Court addressed the validity of confessions of judgments was in *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) and in *Swarb, supra*. In *Overmyer*, this Court held that an Ohio statute regarding judgment by confession did not violate due process. *Overmyer*, 405 U.S. at 187. The Court noted that the debtor was not rendered defenseless since the Ohio system permitted judgment to be vacated upon the showing of a valid defense. Justice Douglas, in his concurrence, compared the heavy burden placed on the debtor in Pennsylvania to the lesser burden in Ohio. *Id.* at 190. As a result, Pennsylvania amended its rule governing the opening of a confessed judgment. *Kardos v. Morris*, 470 Pa. 337, 342, 368 A.2d 657, 659-60 (1977). Therefore, the standards to be applied to a challenge to a judgment entered by confession, as established by Pennsylvania law, have important due process implications. The more protective Pennsylvania standard was ignored when the Circuit

Court determined that it was not error for the District Court to apply federal common law — a more discretionary standard.

The decision of the Court of Appeals that state law did not apply to the opening or striking of a confessed judgment directly contradicts recent decisions of this Court and every other Circuit Court to address the issue. The failure to apply state law as required by this Court in *O'Melveny & Myers v. Federal Deposit Ins. Corp.*, 114 S. Ct. 2048 (1994), resulted in a different and less protective standard being applied to Petitioners' Motion seeking to Open and/or Strike the confessed judgment. Federal Rule of Civil Procedure 60(b) does not specifically address judgments by confession and is highly discretionary. To the contrary, Pennsylvania applies a non-discretionary standard in the opening of confessed judgments. Pa. R. C. P. 2959(e). This disparity is exemplified by the statement of the District Court that a motion for relief from judgment should only be granted in exceptional circumstances, App. 30a, when compared to the mandate in Pennsylvania that if sufficient evidence is presented to survive a directed verdict, the confessed judgment must be opened. Pa. R. C. P. 2959(e). Here, neither the District Court nor the Circuit Court analyzed Petitioners' failure of consideration defense under Pennsylvania law as required by *O'Melveny*. Such a failure lessened the procedural due process protections to which Petitioners were entitled.

A similar erroneous result occurred when the confessed judgment against Mrs. Isenhart was not stricken because the Complaint did not contain her signature. The requirement that Mrs. Isenhart's signature be attached as an exhibit to the Complaint as required by Pa. R. C. P. 2952(b), serves important due process requirements in factually demonstrating a knowing and intelligent waiver of a prejudgment hearing by the debtor. The absence of such a signature prohibits the entry of a confession of judgment and renders the judgment void *ab initio* in Pennsylvania.

The different treatment of a request to open or strike a confessed judgment in federal court, compared to more protective state court standards, will result in forum shopping by creditors seeking to confess judgment in federal court to obtain a more favorable discretionary review of challenges to the confessed judgment. This Court should grant certiorari to provide federal courts with the appropriate guidelines for opening and/or striking a confessed judgment in federal court, to prevent forum shopping, to resolve a conflict between the Circuits regarding the application of state law in similar situations, and to correct the Third Circuit Court of Appeals' failure to apply state law as required by holdings of this Court.

I.

THE THIRD CIRCUIT'S APPLICATION OF FEDERAL COMMON LAW TO A JUDGMENT ENTERED BY CONFESSION CONFLICTS WITH DECISIONS OF THIS COURT AND FOUR OTHER CIRCUITS.

A. The Third Circuit's Failure to Apply State Law to a Motion for Relief from Judgment Conflicts With Decisions of this Court.

This Court recently reaffirmed the principal that "[t]here is no federal general common law." *O'Melveny & Myers v. Federal Deposit Ins. Corp.*, 114 S. Ct. 2048, 2053 (1994) (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). In *O'Melveny*, this Court made clear that the creation of a federal rule of decision is warranted only in "extraordinary cases." *Id.* at 2056. Despite this Court's clear mandate, the Third Circuit erroneously failed to apply state law as the rule of decision in the present case.

The question presented in *O'Melveny* was "whether, in a suit

by the Federal Deposit Insurance Corporation as receiver of a federally insured bank, it is a federal-law or rather a state-law rule of decision that governs the tort liability of attorneys who provided services to the bank." *Id.* at 2051. This Court concluded state law should apply and reasoned that judicial creation of a special federal rule should be limited to instances where there is a "significant conflict between some federal policy or interest and the use of state law." *Id.* at 2055 (quoting *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

The Third Circuit, while recognizing that this Court's *O'Melveny* decision supported the conclusion that state law should apply, nonetheless held that its prior decisions in *Central W. Rental Co. v. Horizon Leasing*, 967 F.2d 832 (3d Cir. 1992) and *Adams v. Madison Realty & Development, Inc.*, 937 F.2d 845 (3d Cir. 1991), which hold that federal common law provides the rule of decision, were not directly overruled by *O'Melveny*. App. 18a.

In *Adams*, the Third Circuit held that federal common law determines the rights and interests of parties to negotiable instruments when the FDIC or RTC is a party. *Adams*, 937 F.2d at 855. However, in *O'Melveny*, this Court specifically held that in a suit by the FDIC, as the receiver of a federally insured bank, state law provides the rule of decision in determining the rights and liabilities of the parties. *O'Melveny*, 114 S. Ct. at 2055-56.

In *Central W. Rental Co.*, the Third Circuit held that since the FDIC's counterclaim in confession of judgment was brought pursuant to 12 U.S.C. § 1819(b)(2)(A), the suit "arises under" federal law and therefore federal common law should provide the rule of decision. *Central W. Rental Co.*, 967 F.2d at 836-37.

However, there is no procedure for confessing judgment under federal common law. *Id.* at 836; *see also, Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1265 (3d Cir.

1994) (noting that power to confess judgment depends on a state statute and the procedure for doing so depends on state procedural rules of general application). Therefore, in *Central W. Rental Co.*, the FDIC was asserting a cause of action created by Pennsylvania law.

In *O'Melveny*, this Court held that state law provided the rule of decision where the FDIC was asserting a cause of action created by California law. *O'Melveny*, 114 S. Ct. at 2055-56. In reaching that decision, this Court recognized that when the FDIC, acting as a receiver, asserts the claims of a S & L, any defense good against the S & L is good against the FDIC. *Id.* at 2054.

It is clear that the Third Circuit's decision is in conflict with this Court's recent decision in *O'Melveny*. The only conclusion that can be reached is that *Central W. Rental Co.* and *Adams* were overruled *sub silentio* by this Court's decision in *O'Melveny*. By failing to reverse the District Court for applying federal law and by holding that *O'Melveny* did not clearly command such a result, the Third Circuit's opinion is in conflict with this Court's decision in *O'Melveny*.

B. The Third Circuit's Failure to Apply State Law to a Motion for Relief from Judgment Conflicts with Decisions of the Fourth, Fifth, Tenth and Eleventh Circuits.

The Third Circuit held that this Court's decision in *O'Melveny* did not mandate that state law be applied as the rule of decision in the present case. However, every other United States Court of Appeals to address this issue has held that *O'Melveny* creates a strong presumption that state law should be applied as the rule of decision to state law causes of action brought by either the FDIC or the RTC:

FOURTH CIRCUIT: *Resolution Trust Corp. v.*

Maplewood Investments, 31 F.3d 1276, 1294 (4th Cir. 1994) ("In light of *O'Melveny*, there is a heavy presumption in favor of application of a rule of decision in accordance with Virginia law as opposed to the creation of a federal rule of decision.").

FIFTH CIRCUIT: *Federal Deposit Insurance Corp. v. Massingill*, 30 F.3d 601, 604 (5th Cir. 1994) ("In light of the Supreme Court's recent decision in [*O'Melveny*], we agree that, based upon the facts of this case, we should not create a substantive federal common-law rule of decision with regard to the ability of [the defendant] to assert his defense of impairment of collateral in this case.")

TENTH CIRCUIT: *Federal Deposit Insurance Corp. v. Oldenburg*, 34 F.3d 1529, 1538-39 (10th Cir. 1994) ("State law is presumed adequate unless it conflicts with federal statutory provision or there is a significant conflict between some federal policy or interest and the use of state law." (quotation marks omitted)).

TENTH CIRCUIT: *Resolution Trust Corp. v. Artley*, 28 F.3d 1099, 1102-03 (11th Cir. 1994) ("We believe the Supreme Court's decision in *O'Melveny* is also instructive: 'It is hard to avoid the conclusion that [12 U.S.C.] sec. 1821 (d)(2)(A)(i) places the FDIC in the shoes of the insolvent S & L, to work out its claims under state law, except where some provisions in the extensive framework of FIRREA provides otherwise'." (quoting *O'Melveny*, 114 S. Ct. at 2054)).

Even though the Third Circuit Court of Appeals recognized recent decisions of this Court supported Petitioners' position that

state law should govern, it concluded that since *Central W. Rental Co.* and *Adams* had not been overruled, the Court of Appeals would not conclude the District Court erred in applying federal common law. Clearly, the position taken by the Third Circuit Court of Appeals conflicts with decisions of every other Circuit Court of Appeals to address the issue.

By failing to apply state law, the Court of Appeals required Petitioners to provide a higher quantum of evidence in seeking to have the judgment opened. In addition, the Court of Appeals could follow no clear guidelines under federal common law in determining whether to open a confessed judgment, but clear guidelines do exist under Pennsylvania law. To permit a different standard to be applied simply because the RTC confessed judgment in federal court instead of state court, not only contradicts this Court's decision in *O'Melveny,* but alters the burden required to open a confessed judgment, discussed *infra.* Certiorari is warranted to resolve this conflict and any ambiguities regarding this Court's holding in *O'Melveny.*

C. Federal Rule of Civil Procedure 60(b) Does Not Preclude the Application of Due Process Protections Found in Pennsylvania Rules of Civil Procedure Regarding Confessions of Judgment.

Finally, under the principals set forth by this Court in *Erie R. Co. v. Tompkins*[2] and its progeny, a federal court applying Pennsylvania law as the rule of decision must also apply Pennsylvania's standard for opening and/or striking confessed judgments. First, Fed. R. Civ. P. 60(b) does not conflict with

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2. Commentators and courts have recognized that the Erie Doctrine applies in federal question cases as well as diversity cases. *See Maternally Yours, Inc. v. Your Maternity Shop, Inc.,* 234 F.2d 538, 540-41 n.1 (2d Cir. 1956); Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4515 (1982).

Pennsylvania's mandatory standards for opening and/or striking confessed judgments. Therefore, the issue of whether to apply Pennsylvania's mandatory rules for opening and/or striking confessed judgments is governed by an *Erie* analysis instead of the Rules Enabling Act. *Hanna v. Plumer,* 380 U.S. 460, 471 (1965).

Second, application of Pennsylvania's mandatory rules for opening and/or striking confessed judgments in federal court satisfies the twin elements of *Erie:* (1) discouragement of forum-shopping and (2) avoidance of inequitable administration of the laws. *Id.* at 468. Normally, what rules are available for post-judgment relief will not play a major factor in selecting a forum. However, due to the unique nature of a confession of judgment, the standards to be applied to a motion for relief from judgment seeking to open and/or strike a confessed judgment are critical. Under Pennsylvania law, a judgment can be entered without any notice to the other party. Pa. R. C. P. 2951. Therefore, the first legal attack by the other party must be for post-judgment relief. If the federal courts were to apply a more discretionary standard for opening and/or striking a confessed judgment, federal courts would undoubtedly be the preferred forum.

Furthermore, the enactment of Fed. R. Civ. P. 60(b) does not alter this outcome. The Advisory Committee Notes to the 1946 Amendment of Rule 60 state:

> It should be noted that Rule 60(b) does not assume to define the substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief.

Fed. R. Civ. P. 60(b), Note to Subdivision (b). Therefore, while Rule 60(b) prescribes the procedure through which an action

must be brought it does not prescribe the substantive law as to when relief is warranted.

Additionally, if federal courts were to place more onerous burdens upon a party seeking to open and/or strike a confessed judgment, a state-created cause of action would be applied inequitably in federal court. In essence, federal courts would permit the draconian confession of judgment procedure without any of the safeguards created by state statutory law.

II.

THE THIRD CIRCUIT'S FAILURE TO APPLY STATE LAW AS REQUIRED BY THIS COURT HAS RESULTED IN PETITIONERS BEING SUBJECT TO A DIFFERENT STANDARD IN SEEKING TO OPEN AND STRIKE A CONFESSED JUDGMENT.

As early as 1882, this Court held that a federal court enforcing a state law cause of action is bound to apply specific state statutes that provide guaranteed rights regarding new trials. *Equator Mining & Smelting Co. v. Hall,* 106 U.S. (16 Otto) 86 (1882). In *Equator Mining & Smelting Co.,* an action of ejectment was brought in federal court pursuant to the laws of Colorado to recover possession of a silver mine. The Colorado code also provided specific statutory guarantees regarding the right to a new trial. The United States Circuit Court denied a motion for a new trial made pursuant to Colorado statute. In reversing the Circuit Court, this Court held:

> We are of the opinion that when an action of ejectment is tried in a circuit court of the United States according to the statutory mode of proceeding, that court is governed by the provisions concerning new trials as it is by the

> other provisions of the state statute. There is no reason why the federal court should disregard one of the rules by which the state legislature has guarded the transfer of the possession and title to real estate within its jurisdiction.

Id. at 88. This same reasoning mandates that Pennsylvania's statutory and common law rules providing specific rights concerning opening and/or striking confessed judgments should be applied by federal courts that have confessed judgments pursuant to state law.

A. Striking the Judgment Against Mrs. Isenhart.

The Third Circuit directed that the judgment against Mrs. Isenhart be *opened.* App. 26a. However, under Pennsylvania law, the judgment should have been stricken. Under Pennsylvania law, a judgment *must* be stricken where it is not self-sustaining on the record. *Stewart v. Jackson,* 181 Pa. 549, 550, 37 A. 518, 519 (1897); *see also, Roche v. Rankin,* 406 Pa. 92, 176 A.2d 668 (1962) (judgment must be stricken where it is not self-sustaining); *Meyers & Joly v. Freiling,* 81 Pa. Super. 116 (1923) (where amount for which judgment is entered cannot be ascertained without resorting to evidence outside the writing it must be stricken). There is no discretion in this decision.

Under a motion to set aside a default judgment under Rule 60(b), the proper inquiry is:

> whether vacating the . . . judgment will visit prejudice on the plaintiff, whether the defendant has a meritorious defense, and whether the default was the result of the defendant's culpable conduct. The "threshold

> question" is whether the defendant has alleged facts which, if established at trial, would constitute a meritorious defense to the cause of action.

Central W. Rental Co., 967 F.2d at 836. Under Rule 60(b), the standard is discretionary. *See* Fed. R. Civ. P. 60(b) ("On motion and upon such terms as are just, the court *may* relieve a party . . . from a final judgment.") (emphasis supplied).

Furthermore, under Pennsylvania rules, a petition to strike a confessed judgment is reviewed differently than under federal law. Under Pennsylvania law, the only issue is "whether the record as filed by [the judgment creditor] at entry is adequate to sustain the judgment, or is defective in some way." *Parliament Ind., Inc. v. William H. Vaughan & Co., Inc.*, 500 Pa. 1, 8, 459 A.2d 720, 724 (1983). In the decision below, the Third Circuit reviewed the District Court's decision under an abuse of discretion standard. App. 12a.

The Third Circuit applied the federal discretionary standard when it opened, instead of striking, the judgment against Mrs. Isenhart. The evidence is clear that, at the time the judgment was entered, Mrs. Isenhart's signature did not appear on the complaint as required by Pa. R. C. P. 2952(b). R. 8-30. Furthermore, the Third Circuit held that the power of attorney which Mrs. Isenhart signed did not give Mr. Isenhart the power to sign her name to a document confessing judgment against her. App. 25a. Applying Pennsylvania law, the District Court should have struck the judgment and in failing to do so, the Third Circuit, exercising plenary review, should have reversed the District Court.

B. Opening the Judgment Against Forest Grove and Mr. Isenhart.

The standard in Pennsylvania for opening a confessed judgment is whether the party has presented evidence sufficient to have the matter reach a jury. If such a quantum of evidence is presented the judgment must be opened. *Kardos v. Morris,* 470 Pa. 337, 341, 368 A.2d 657, 660; Pa. R. C. P. 2959(e). This standard eliminates the burden of persuading the court. *Id.* This directed verdict standard requires a court to view all evidence in the light most favorable to Petitioners, accept as true that evidence and all inferences from that evidence, and reject the adverse allegations of the creditors. *Iron Workers S & L v. IWS, Inc.,* 424 Pa. Super. 255, 261-62, 622 A.2d 367, 370 (1993). The Petitioners are not required to demonstrate that if the judgment is opened they will prevail. *Liazis v. Kosta, Inc.,* 421 Pa. Super. 502, 507,618 A.2d 450, 453 (1992), *appeal denied,* 536 Pa. 630, 637 A.2d 290 (1993). If the averments supporting the judgment are contested the remedy is to open the judgment. *Kros v. Bacall Textile Corp.,* 386 Pa. 360, 365, 126 A.2d 421, 424 (1956). If the court determines that the judgment creditor has produced sufficient evidence to get a jury, the judgment must be opened. The court may not "weigh the evidence in support of the defense [of the judgment creditor]." *Pawco, Inc. v. Bergman Knitting Mills, Inc.,* 283 Pa. Super. 443, 455, 424 A.2d 891, 897 (1980).

In failing to apply Pennsylvania law, the District Court and Court of Appeals applied the wrong standard in reviewing Petitioners' evidence in determining, not whether the defense of failure of consideration was sufficient to go before a jury, but only that Hill Financial did not breach the loan agreement. App. 22a, 35a. This is evidenced by the statement by the District Court that it found that Hill Financial did not breach the agreement agreement. App. 35a. It is also evidenced by the statement by the Court of Appeals that the record could not support a finding that Hill Financial breached the agreement. App. 22a. In both cases,

this is the wrong inquiry. The proper inquiry is only whether Petitioners presented sufficient evidence to withstand a motion for directed verdict Pa. R. C. P. 2959(e).

In seeking to have the judgment opened, the Petitioners raised the argument that the failure of Hill Financial to release the balance of the loan funds was a failure of consideration. App. 56a. The language of the loan commitment letter provides the terms and conditions of the loan to Forest Grove and states that:

> 1. Loan - $1,815,000.00 (a maximum of $660,000.00 to be released at settlement). The balance is to be escrowed and disbursed as spaces are completed and leased up to achieve the "stabilized value".

App. 84a. The method of disbursement is not further defined in the commitment letter and the phrase "stabilized value" is not defined at all. The Suretyship Agreement incorporates the terms of the commitment letter via the Bond and Warrant executed by Forest Grove. R. 25a, 27a. Despite repeated requests, Hill Financial refused to release the balance of the loan. As a result, the remaining mobile home spaces could not be completed and the park could not become a viable operation.

The Pennsylvania Supreme Court has held that "[f]ailure of consideration goes to the heart of any claim based on an agreement and is thus always available as a *defense* to that claim." *M.N.C. Corp. v. Mount Lebanon Medical Center, Inc.*, 510 Pa. 490, 495, 509 A.2d 1256, 1259 (1986) (emphasis in original). Further, the party "asserting failure of consideration must show that the consideration *contemplated* was never received." *Dahar v. Grzandziel*, 410 Pa. Super. 85, 93, 599 A.2d 217, 221 (1991) (emphasis in original). "Failure of consideration occurs when the

consideration bargained for does not pass, in whole or in part, to the promisor." *McGuire v. Schneider, Inc.*, 368 Pa. Super. 344, 350, 534 A.2d 115, 118 (1987), *aff'd per curiam*, 519 Pa. 439, 548 A.2d 1223 (1988).

In construing an agreement which contains ambiguous language such as that in the commitment letter, "doubtful language is construed *most strongly* against the drafter thereof." *Rusiski v. Pribonic*, 511 Pa. 383, 390, 515 A.2d 507, 510 (1986) (emphasis supplied).

Furthermore, the construction placed on the commitment letter by the District Court that Hill Financial did not agree to pre-fund the construction requires the language in that letter to be construed as a condition precedent. Specifically, this interpretation requires mobile home sites to be completed and leased up prior to any additional funds being released. However, "an event mentioned in a contract will not be construed as a condition precedent unless expressly made such a condition." *West Development Group, Ltd. v. Horizon Financial, F.A.*, 405 Pa. Super. 190, 199, 592 A.2d 72, 76 (1991). The failure to apply the foregoing standards of Pennsylvania state law, ignoring this Court's directive in *O'Melveny*, resulted in a different and less protective standard being applied to Petitioners.

It is clear that the District Court applied the wrong standard when it determined that the failure of consideration defense was not sufficient to open the judgment. The District Court held:

> Defendants have not adduced facts which, if established, would constitute a meritorious defense in this action.

(App. 37a). The standard the District Court should have applied under *O'Melveny* was whether, viewing all facts and proper

inferences therefrom in favor of Petitioners, there existed sufficient evidence to go to a jury. Therefore, the District Court erred, as a matter of law, by applying the wrong standard.

The Third Circuit also applied the wrong standard. Instead of reversing the District Court and remanding the case so that the proper standard could be applied, the Third Circuit also reviewed the evidence and held:

> We do not believe this is ambiguous; nor do we think that the record could support a finding that Hill breached this part of the agreement.

App. 21a-22a. The Circuit Court should not weigh the evidence and determine if it supports the defense alleged. Rather, it should only determine if sufficient evidence exists, viewing all facts and proper inferences therefrom in favor of Petitioners, to be submitted to a jury.

III.

FAILING TO FOLLOW STATE LAW WHEN ENTERING A CONFESSED JUDGMENT IN FEDERAL COURT CONFLICTS WITH DECISIONS OF THIS COURT AND VIOLATES THE DEBTOR'S PROCEDURAL DUE PROCESS RIGHTS RENDERING THE JUDGMENT VOID *AB INITIO.*

Under Pennsylvania Rule of Civil Procedure 2952(b), a complaint to confess judgment must contain "the original or a photostatic copy or like reproduction of the instrument showing the defendant's signature." If the signature of the alleged debtor is not attached to the complaint, "judgment may be entered only by leave of court after notice." Pa. R. C. P. 2951(e). Through the

rules promulgated by the Pennsylvania Supreme Court, Pennsylvania has determined what process is due before a judgment can be confessed. Therefore, under Pennsylvania law, either the defendant's signature or leave of court after notice is necessary before a judgment can be confessed.

The District Court, however, confessed judgment against Mrs. Isenhart without her signature appearing on the instrument and without leave of court after notice. Judgment was confessed against Mrs. Isenhart under the alleged authority of state law. R. 30. Although the District Court relied on the state law cause of action, it failed to provide Mrs. Isenhart with the procedural due process rights she was entitled to under state law.

In *Overmyer,* this Court upheld the validity of confession of judgment clauses in a commercial context where there is no unequal bargaining power or overreaching. This Court held that "due process rights to notice and a hearing prior to civil judgment are subject to waiver." *D.H Overmyer Co., Inc.,* 405 U.S. at 185. However, for such a waiver to be effective, it must be done "voluntarily, intelligently and knowingly . . . with full awareness of the legal consequences." *Id.* at 187.

Mrs. Isenhart never made a knowing, intelligent and/or voluntary waiver of her due process rights. She never signed the Suretyship Agreement, she was never told that the Suretyship Agreement contained a confession of judgment clause, and she never saw a copy of the Suretyship Agreement. App. 58a. This evidence was uncontroverted on the record. Still the District Court found that Mrs. Isenhart waived her due process rights, and the Third Circuit only ordered the judgment to be opened rather than stricken. Since the Complaint filed by the RTC contained neither Mrs. Isenhart's signature nor an explanation regarding the absence of her signature, there was no method to ascertain whether she waived her due process rights. The RTC's failure to

comply with the requirements of *Overmyer,* as reflected in Pa. R. C. P. 2952(b), render the judgment as to Mrs. Isenhart void *ab initio.*

IV.

THE ISSUES PRESENTED ARE IMPORTANT.

Certiorari should be granted since this Court has never addressed the proper standards to be applied to the opening and striking of judgments confessed in federal court. There exists no federal substantive law on opening and/or striking confessed judgments. *See Central W. Rental Co.,* 967 F.2d at 836. In the absence of guidance from this Court, federal courts are applying standards designed to provide relief from default judgments to situations where judgment has been confessed. The two situations are obviously not comparable. A default judgment is entered after a party, who has been served notice, fails to plead or otherwise defend. Fed. R. Civ. P. 55(a). A confessed judgment is entered without providing a party notice or any opportunity to defend. Mandatory post-judgment relief is an important safeguard to prevent abuses from the act of confessing judgment. *See Overmyer, supra.* It is important that this Court provide federal courts with guidance regarding the standards to be applied to post-judgment relief from judgments by confession.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED AUGUST 26, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-1944, 93-1945 & 93-1946

RESOLUTION TRUST CORPORATION, AS RECEIVER OF HILL FINANCIAL, S.A.

v.

FOREST GROVE, INC.; RONALD ISENHART, a/k/a RON W. ISENHART; DELORES A. ISENHART

FOREST GROVE, INC.,

Appellant at No. 93-1944

RONALD ISENHART, a/k/a RON W. ISENHART,

Appellant at No. 93-1945

DELORES A. ISENHART,

Appellant at No. 93-1946

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 92-cv-06707

Argued: May 5, 1994

Appendix A

PRESENT: SLOVITER, *Chief Judge,* HUTCHINSON, *Circuit Judge,* and DIAMOND, *District Judge**

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and

Keven M. Crotty, Esquire
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* Hon. Gustave Diamond, United States District Judge for the Western District of Pennsylvania, sitting by designation.

Appendix A

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Corporation, as Receiver of Hill
Financial, S.A.

OPINION OF THE COURT

HUTCHINSON, *Circuit Judge.*

Appellants, Forest Grove, Inc. ("Forest Grove"), Ronald Isenhart ("Mr. Isenhart"), ad Delores A. Isenhart ("Mrs. Isenhart") (collectively the "Isenharts"), appeal an order of the United States District Court for the Eastern District of Pennsylvania denying their motion for Relief from Judgment pursuant to Federal Rules of Civil Procedure 60 and 62. In that order, the district court refused to open or strike a judgment which appellee, the Resolution Trust Corporation ("RTC"), had confessed against Forest Grove, as principal debtor, and against the Isenharts pursuant to a surety agreement ("Surety Agreement") they had signed.

The district court held that opening the judgment confessed against Forest Grove and the Isenharts was not warranted because they had failed to state a meritorious defense. The district court found that Mr. Isenhart had knowingly and intelligently waived his constitutional right to procedural due process when he signed the Surety Agreement.[1] It also concluded that Mrs. Isenhart's execution of a power of attorney appointing her husband her

1. On appeal, Mr. Isenhart does not contest the district court's holding that he knowingly and intelligently waived his rights to notice and hearing when he executed the Surety Agreement.

attorney-in-fact gave him authority to sign the Surety Agreement for her and to authorize confession of judgment as provided in the Surety Agreement. Applying federal law rather than Pennsylvania law to determine the procedural requirements for a valid confession of judgment in federal court, it held that the judgment against Mrs. Isenhart could not be stricken as facially defective solely because she did not personally sign the Surety Agreement. It also concluded that Mrs. Isenhart had knowingly and intelligently waived her right to procedural due process under the Fourteenth Amendment to the United States Constitution. Finally, the district court rejected the common defense of Forest Grove and the Isenharts that the confession of judgment provisions in the bond and warrant executed by Forest Grove as principal and in the Surety Agreement by the Isenharts were unenforceable because there was a failure of consideration.

We will affirm the district court's order denying the motions of Forest Grove and Mr. Isenhart to open or strike the judgments; we will reverse the part of the district court's order that refused to strike or open the judgment against Mrs. Isenhart. We believe the district court applied an incorrect legal standard in refusing Mrs. Isenhart's motion, and its finding of fact that she had knowingly and intelligently waived her due process rights was clearly erroneous. Therefore, we conclude it abused its discretion when it refused to open or strike the judgment against Mrs. Isenhart based on its determination that Mrs. Isenhart's execution of the power of attorney gave her attorney-in-fact authority to confess judgment against her.

I. *Factual & Procedural History*

Forest Grove is a Delaware corporation. Mr. Isenhart, Robert Quick and William Dougherty were Forest Grove's officers. In

Appendix A

1986, Forest Grove applied to Hill Financial Savings Association ("Hill") for a loan of $1,815,000.00 to finance construction of a mobile home park. Hill had already loaned millions of dollars to Forest Grove's officers. When Forest Grove submitted the 1986 loan application, Hill had over $9.5 million on loans outstanding to these officers. When Forest Grove applied for the 1986 loan from Hill, the mobile home park had fifty fully developed mobile home lots, forty-eight partially developed mobile home lots and sixty-nine undeveloped mobile home lots.

On October 1, 1986, Hill issued a commitment letter ("Commitment Letter") agreeing to lend Forest Grove the $1,815,000.00. It provided:

> 1. Loan – $1,815,000.00 (a maximum of $660,000.00 to be released at settlement). The balance is to be escrowed and disbursed as spaces are completed and leased up to achieve the "stabilized value."

Appendix ("App.") at 74.[2] The Commitment Letter also required each of Hill's officers to submit personal financial and income statements and required each of the officers and their spouses to guarantee the loan. All the property listed in Mr. Isenhart's financial statement was held jointly with Mrs. Isenhart. Hill and Forest Grove signed the Commitment Letter on October 15, 1986.

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2. All appendix references are to the "Appendix for Appellant" submitted by Mrs. Isenhart unless otherwise indicated.

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On November 12, 1986, Mrs. Isenhart executed a "General Power of Attorney" ("Power of Attorney"). *Id.* at 83. That Power of Attorney appointed Mr. Isenhart as her attorney-in-fact. In relevant part, it gave Mr. Isenhart the following authority:

> 1. To exercise the following powers with respect to any real estate or interest therein which may now or hereafter belong to me
>
> * * *
>
> (f) To execute and deliver, extend, renew, replace or increase any mortgages affecting such real estate, and, for such purpose, to sign, seal, and deliver any notes or extension, renewal or other agreements necessary or useful to accomplish such purpose.
>
> * * *
>
> 5. To borrow any sum or sums of money, at such rates of interest and upon such terms, provisions and conditions as my said attorney may think proper, and for such purposes to sign, seal, acknowledge and deliver any notes, drafts, acceptances or other obligations, and to sign, seal, acknowledge and deliver mortgages on any of my real or personal property, or any other form of security my attorney may deem proper.
>
> * * *

Appendix A

> 8. To enter into, make, sign, execute, deliver, acknowledge and perform all contracts, agreements, writings or things that may in the opinion of my said attorney be necessary or proper to be done, including, but without limiting the generality of the foregoing, any agreements involving medical, maintenance, support, educational or emergency expenditures on behalf of myself or persons designated by my said attorney.
>
> * * *
>
> 20. Without in any manner limiting the foregoing, generally to do, execute and perform any other act, deed, matter or thing of every nature and kind whatsoever, that ought to be done, executed and performed, or that, in the opinion of my said attorney ought to be done, executed or performed in and about the premises, as fully and effectually as I could do if personally present.

Id. at 83-84. Mrs. Isenhart's Power of Attorney does not expressly authorize her attorney-in-fact, Mr. Isenhart, to enter into agreements containing a confession of judgment clause.

On the same day Mrs. Isenhart signed the Power of Attorney, Mr. Isenhart signed a Surety Agreement in compliance with the Commitment Letter's condition that Forest Grove's individual officers and their spouses guarantee the repayment of the loan from Hill. Mr. Isenhart signed the Surety Agreement on behalf of

Mrs. Isenhart on a signature line beneath which her typed named appeared followed by the handwritten statement "BY RONALD ISENHART HER ATTORNEY-IN-FACT." *Id.* at 30.

The Surety Agreement is a four-page, fifteen paragraph document. Paragraph 7, on the third page, provides:

> CONFESSION OF JUDGMENT. The Surety hereby irrevocably authorizes the Prothonotary or any attorney of any court of record to appear for and confess judgment against the Surety for the amount set forth under Principal Debtor's Liabilities to Hill with or without default by either Surety or Principal Debtor, with five percent (5%) thereof added as reasonable attorneys' commission with costs of suit and release of errors. . . .

Id. at 29. The Surety Agreement, at paragraph 15, has a choice of law clause. It provides "All issues arising hereunder shall be governed and determined by the laws of the Commonwealth of Pennsylvania." *Id.* at 30.

Simultaneously with the execution of the Power of Attorney and the Surety Agreement, Forest Grove signed a Bond and Warrant evidencing the terms of its obligation to repay the loan. The Bond and Warrant is three pages in length and incorporates the terms and conditions of the Commitment Letter. On the last page, the Bond and Warrant also has a confession of judgment clause. It provides:

> AND FURTHER, OBLIGOR HEREBY

AUTHORIZES AND EMPOWERS THE PROHONOTARY, CLERK OR ANY ATTORNEY OF ANY COURT OF RECORD OF THE COMMONWEALTH OF PENNSYLVANIA, THE STATE OF DELAWARE, OR ELSEWHERE, TO APPEAR FOR OBLIGOR AND, WITH OR WITHOUT A DECLARATION FILED, TO CONFESS OR ENTER A JUDGMENT IN THE NAME OF AND AGAINST OBLIGOR AND IN FAVOR OF OBLIGEE, FOR THE ORIGINAL PRINCIPAL SUM ABOVE-MENTIONED WITH COSTS OF SUIT, AND A FULL RELEASE OF ALL ERRORS. AND OBLIGOR HEREBY WAIVES AND RELEASES *ANY* BENEFIT OR ADVANTAGE OF ANY STAY OR SETTING ASIDE OF EXECUTION OR OTHER PROCESS, OF ALL LAWS AND RULES NOW IN FORCE, OR THAT MAY BE ENACTED, ADOPTED, OR PROMULGATED, EXEMPTING PROPERLY EITHER REAL OR PERSONAL, OR THE PROCEEDS THEREOF, FROM LEVY AND SALE UNDER ANY EXECUTION THAT MAY BE ISSUED FOR THE COLLECTION OF THE SAID JUDGMENT.

Id. at 25. The capitalization of this paragraph distinguishes it from the rest of the text. Both Robert Quick and Mr. Isenhart signed this document on behalf of Forest Grove. It was not signed by any of the officers or their spouses individually.

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Hill collected commitment fees from Forest Grove based on Hill's total loan commitment of $1,815,000.00, but it only advanced Forest Grove approximately $1,210,000.00. After May 1988, Hill made no further disbursements despite Forest Grove's 1988 request that Hill disburse the remaining funds so Forest Grove could complete the mobile home park as planned. Forest Grove also alleges that Hill's final response to Forest Grove's repeated requests to disburse the rest of the funds committed was a flat no in the fall of 1989. After this express refusal, a local ordinance regulating on-site sewer systems in Kent County, Delaware, where Forest Grove's mobile home park was located, was changed. These changes prevented Forest Grove from completing the project as designed.

On October 12, 1989, the Office of Thrift Supervision ("OTS") declared Hill insolvent and appointed RTC as Hill's receiver. In 1989, Forest Grove failed to make the monthly payments due under the terms of the loan. On February 2, 1990, RTC notified Forest Grove that it was in default. On November 20, 1992, RTC, as Hill's receiver, filed a complaint asking the district court to permit it to confess judgment against Forest Grove, and Mr. and Mrs. Isenhart. On November 25, 1992, the district court granted RTC's request for relief and entered Judgment by confession against Forest Grove and Mr. and Mrs. Isenhart.

On January 12, 1993, Forest Grove and the Isenharts filed a Federal Rule of Civil Procedure 60/62[3] motion seeking relief

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3. Federal Rule of Civil Procedure 60(b) provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final Judgment, order, or proceeding for the

(Cont'd)

from the confession of Judgment. In their motion, Forest Grove and the Isenharts asked the court to strike or open the November 25, 1992 Judgment. By order entered September 9, 1993, the district court denied the motion. This timely appeal followed.

II. *Jurisdiction & Standard of Review*

The district court had subject matter Jurisdiction over this case under 12 U.S.C.A. § 1441a(1)(1). It provides:

> Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the [RTC] is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding.

(Cont'd)

following reasons:. . . . (6) any other reason justifying relief from the operation of the judgment.

Fed. R Civ. P. 60(b).

Federal Rule of Civil Procedure 62(b) provides in relevant part:

> In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of . . . a motion for relief from a ludgment or order made pursuant to Rule 60. . . .

Fed. R Civ. P. 62(b).

12 U.S.C.A. § 1441a(1)(1) (West Supp. 1994). We have appellate jurisdiction over the final order of the district court denying the debtors' motion to strike or open the judgments confessed against them pursuant to 28 U.S.C.A. § 1291 (West 1993).

Federal Rule of Civil Procedure 60(b) governs a motion to open or strike a judgment entered by confession in a federal court. *See Central W. Rental Co. v. Horizon Leasing*, 967 F.2d 832, 836 (3d Cir. 1992). We review a district court's denial of a Rule 60(b) motion for abuse of discretion. *Id; see also Lasky v. Continental Prods. Corp.*, 804 F.2d 250, 256 (3d Cir. 1986). We exercise plenary review, however, over the district court's choice of the standards to be used in exercising such discretion. *Cf. Grode v. Mutual Fire, Marine and Inland Ins. Co.*, 8 F.3d 953, 957 (3d Cir. 1993) ("In reviewing the district court's abstention, the underlying legal questions are subject to plenary review, but the decision to abstain is reviewed for an abuse of discretion.") We examine any factual findings the district court relies on to see whether they are clearly erroneous. *See United States v. Pozsgai*, 999 F.2d 719, 724 n.5 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1052 (1994).

III. *Analysis*

A. *Applicable Substantive Law*

We consider first Forest Grove's and the Isenharts' contention that the district court erred when it applied federal common law to this case instead of Pennsylvania substantive law. We have recognized that "[p]rocedurally, a motion to open or strike a judgment entered by confession in a federal court is governed by Rule 60(b)." *Central W. Rental Co.*, 967 F.2d at 836 (citations omitted). We have also stated that in the analogous

context of a motion to set aside a default judgment under Rule 60(b), the proper inquiry is:

> whether vacating the . . . judgment will visit prejudice on the plaintiff, whether the defendant has a meritorious defense, and whether the default was the result of the defendant's culpable conduct. The "threshold question" is whether the defendant has alleged facts which, if established at trial, would constitute a meritorious defense to the cause of action.

Id. (citations and internal quotation omitted). Thus, in *Central W. Rental Co.*, we considered whether a confession of judgment should be opened under Rule 60(b) by looking at these factors. *Id.*

In *Central W. Rental Co.*, a vehicle lessor and the lessor's guarantors appealed the district court's refusal to grant their Rule 60(b) motion for relief from a confessed judgment the Federal Deposit Insurance Corporation ("FDIC") had obtained against them. *Id.* at 833-34. FDIC confessed judgment against the guarantors under a guaranty agreement which secured financing for their leasing business. *Id.* at 834. FDIC sought to recover the residual value of numerous leased vehicles that had been repossessed and sold at a loss. *Id.* at 835. As a defense, the lessor and its guarantors argued they were entitled to notice of the sale of the repossessed vehicles. *Id.* at 835, 836. We first concluded that the guarantors' defense that both they and the lessor were entitled to notice, if proven, would have merit. *Id.* at 836. We then determined that FDIC's claim in confession of judgment arose out of 12 U.S.C.A. § 1819(b)(2)(A), a federal statute. From this, we concluded that federal common law, as opposed to

Pennsylvania state law, controlled the case before us. *Id.* at 836-37; *see also RTC v. Choudhury.* Civ. A. No. 92-2046, 1992 WL 163299, at *3 (E.D. Pa. July 7, 1992) ("Any civil action in which the FDIC or the . . . FSLIC [or RTC], is a party is deemed to rise [sic] under federal law. Thus federal law controls whether the [defendants may] assert [a particular] defense. . . .") (citing *Adams v. Madison Realty & Dev., Inc.*, 937 F.2d 845, 855 (3d Cir. 1991)).

Forest Grove and the Isenharts nevertheless argue that the district court erred when it relied on *Central W. Rental* Co. and applied federal law, as opposed to state law. They assert that *Central W. Rental Co. is* distinguishable because RTC's action to confess judgment in *Central W. Rental Co.* was predicated on section 1819(b)(2)(A), not section 1441a(1)(1) as here. We reject this argument. The text of section 1819(b)(2)(A) is almost identical to that of section 144la(l)(1). *Compare* 12 U.S.C.A. § 1441a(l)(1) ("Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the [RTC] is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding.") with 12 U.S.C.A. § 1819(b)(2)(A) (West 1989) ("Except as provided . . . all suits of a civil nature at common law or in equity to which the [FDIC]. In any capacity, is a party shall be deemed to arise under the laws of the United States.").

Recent United States Supreme Court decisions concerning the use of federal, as opposed to state, law require more careful consideration. Forest Grove and the Isenharts argue *Kamen v. Kemper Financial Services, Inc.*, 111 S. Ct. 1711 (1991) supports their contention that Pennsylvania law should apply. *Kamen* was a shareholder's derivative suit against an investment adviser on a

theory that the adviser had issued a materially misleading proxy statement in violation of the Investment Company Act of 1940 ("ICA"), 15 U.S.C.A. §§ 80a-1 to 80b-21 (West 1981 & Supp. 1994). The Supreme Court held that the demand futility exception as defined by the law of the state of incorporation applied to derivative actions brought under the ICA. It first concluded that "the contours of the demand requirement in a derivative action founded on the ICA are governed by *federal* law. Because the ICA is a federal statute, any common law rule necessary to effectuate a private cause of action under that statute is necessarily federal in character." *Kamen,* 111 S. Ct. at 1717 (emphasis in original). Nevertheless, the Supreme Court went on to state:

> It does not follow, however, that the content of such a rule must be wholly the product of a federal court's own devising. Our cases indicate that a court should endeavor to fill the interstices of federal remedial schemes with uniform federal rules only when the scheme in question evidences a distinct need for nationwide legal standards or when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand[.] Otherwise, we have indicated that federal courts should "incorporat[e] [state law] as the federal rule of decision," unless "application of the [particular] state law [in question] would frustrate specific objectives of the federal programs." The presumption that state law should be incorporated into federal common law is particularly strong in

> areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards.

Id. (citations omitted). Accordingly, the law of the state of incorporation was used to define the demand futility exception. *Id.* at 1722-23.

This past term the Supreme Court addressed whether federal or state law governed the tort liability of parties sued by FDIC, as receiver of a federally insured bank. *See O'Melveny & Myers v. Federal Deposit Ins. Corp.*, 114 S. Ct. 2048 (1994). There, FDIC sued a law firm that had provided services to a federally insured bank, alleging that the law firm had acted negligently and breached its fiduciary duty to the bank. *Id.* at 2051-52. FDIC contended that federal common law, as opposed to state law, determined whether the law firm's defenses were valid. *Id.* at 2052.

The Supreme Court started by revisiting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), stating " 'There is no federal general common law.' " *O'Melveny & Myers*, 114 S. Ct. at 2053. It went on to address FDIC's reliance on a statement in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979) that "federal law governs questions involving the rights of the United States arising under nationwide federal programs."[4] The

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4. In *Kimbell Foods, Inc.*, the Supreme Court set out the factors we should use for determining whether a uniform federal rule should be imposed on federal claims when Congress's intent is unclear. They are: (1) whether the issue requires a nationally uniform body of law; (2) whether application of state law would frustrate specific objectives of the federal programs; and (3) whether, and the extent to which, application of a federal rule would disrupt commercial relationships predicated on state law. *Kimbell Foods, Inc.*, 440 U.S. at 728-29.

Supreme Court reasoned that FDIC is not the United States. *O'Melveny & Myers,* 114 S. Ct. at 2053. As a receiver, under 12 U.S.C.A. § 1821(d)(2)(A)(i) FDIC " 'steps into the shoes' of the failed S & L, obtaining the rights *'of* the insured depository institution' that existed prior to receivership." *Id.* at 2054. It then stated that there must be a " 'significant conflict between some federal policy or interest and the use of state law' " to warrant creation of a special federal rule. *Id.* at 2055 (quoting *Wallis v. Pan Am Petroleum Corp.,* 384 U.S. 63, 68 (1966)) . Referring to its decision in *Kamen,* the Supreme Court held:

> Our cases uniformly require the existence of such a conflict as a precondition for recognition of a federal rule of decision. Not only the permissibility but also the scope of judicial displacement of state rules turns upon such a conflict. What is fatal to [FDIC's] position in the present case is that it has identified *no* significant conflict with an identifiable federal policy or interest. There is not even at stake that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity. The rules of decision at issue here do not govern the primary conduct of the United States or any of its agents or contractors, but affect only the FDIC's rights and liabilities, as receiver, with respect to primary conduct on the part of private actors that has already occurred. Uniformity of law might facilitate the FDIC's nationwide litigation of these suits, eliminating state-by-state research and reducing uncertainty but if the avoidance of

> those ordinary consequences qualified as an identifiable federal interest, we would be awash in "federal common-law" rules.

Id. (emphasis in original) (citations omitted). The Supreme Court concluded that state law governed, noting "this is not one of those extraordinary cases in which the judicial creation of a federal rule of decision is warranted." *Id.* at 2056.

These recent pronouncements of the Supreme Court on the advisability of fashioning federal law in areas traditionally governed by state law support Forest Grove's and the Isenharts' position that Pennsylvania law governs the substantive aspects of their motion to strike or open the judgment RTC had confessed against them. Nevertheless, neither *Central W. Rental Co.* nor *Adams v. Madison Realty & Development, Inc.*, 937 F.2d 845, 855 (3d Cir. 1991) have been directly overruled, and this panel is therefore reluctant to conclude that the district court erred in applying federal common law instead of state law to its determination of whether Forest Grove or the Isenharts asserted a meritorious defense. *Cf. Hammond v. Commonwealth Mortgage Corp. of Am. (In re Hammond,* 1994 WL 246709, at *5-6 (3d Cir. June 9, 1994). Moreover, there are two reasons why it is unnecessary for us to reach that legal question here. First, both parties concede that the result is the same under either Pennsylvania or federal common law and the district court relied alternately on Pennsylvania and federal law in concluding that the Isenharts' and Forest Grove's defense of failure of consideration was not meritorious. In addition, it seems clear to us that the issue whether the confession of judgment violated Mrs. Isenhart's due process rights is a question of federal law regardless of whether state law would generally govern the question of meritorious defenses in an action brought by RTC or

FDIC. *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1273 (3d Cir. 1994) (citing *Brookhart v. Janis*, 384 U.S. 1, 4 (1966)). Thus, we hold that any error the district court may have made in using federal law as the standard for determining whether Forest Grove or the Isenharts had alleged a meritorious defense that would entitle them to open the judgment RTC had confessed against them is immaterial. Whether it used correct principles of applicable law in exercising its discretion to open the judgments, however, is a question yet to be considered.

B. *Failure of Consideration Defense*

The Isenharts and Forest Grove contend the district court erred when it determined that Hill had not breached the loan agreement by refusing to disburse all the funds the Commitment Letter covered. They argue that Hill's failure to remit the full $1.8 million it promised was a failure of consideration, a meritorious defense which should have led the district court to open the judgments confessed against them.

The district court recognized that the Commitment Letter governed Hill's obligation to disburse funds and that it required Hill to disburse money " 'as spaces are completed and leased.' " *Resolution Trust Corp. v. Forest Grove, Inc*, Civ. A. No. 92-6707, slip op. at 9 (E.D. Pa. September 8, 1993). It concluded, however, there was no evidence that Hill had breached this promise by refusing to disburse funds before spaces were completed. The district court also concluded that the Isenharts had received consideration for executing the Surety Agreement when Hill promised to lend Forest Grove $1.8 million under the terms and conditions of the Commitment Letter. In the alternative, it held that Forest Grove and the Isenharts were precluded from asserting a lack of consideration defense against RTC under the

D'Oench Duhme doctrine. *See D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 459-60 (1942).

Forest Grove and the Isenharts argue that the Commitment Letter set forth no express, unambiguous guidelines for distribution of funds and that the district court incorrectly construed the commitment's terms concerning completion of mobile home lots and distribution of funds. They contend that this construction is contrary to Pennsylvania law which requires an event affecting a promisor's obligation to be expressly identified as a condition precedent before it will be so treated. *See West Dev. Group, Ltd v. Horizon Fin., F.A.*, 592 A.2d 72, 76 (Pa. Super. 1991).[5]

Forest Grove and the Isenharts assert that all parties contemplated that Hill would make disbursements as necessary to fund completion of the various sections of the mobile home development. They point to Forest Grove's upfront payment of the full commitment fee in support of this contention. Thus, Forest Grove and the Isenharts assert that the parties' intentions and the terms of the Commitment Letter require Hill to fund Section III of the project upon the completion of Section II and that there was a failure of consideration resulting from its failure to do so in breach of the terms of the Commitment Letter.

Failure of consideration is a defense that arises when "there is a contract when the agreement is made, but because of some supervening cause, the promised performance fails." 1 Samuel Williston & Walter H.E. Jaeger, *A Treatise on the Law of Contracts* § 119A, at 490 (3d ed. 1957). According to Williston:

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5. We once again conclude that the question of applicable law is immaterial.

Appendix A

> Failure of consideration should be regarded as a defense, both substantively and procedurally, and the burden of proof, both as to going forward with the evidence and in the ultimate sense, should be upon the defendant.

Id. § 199A, at 490 n.5. "Failure of consideration goes to the heart of any claim based on an agreement and is thus always available as a *defense* to that claim." *M.N.C. Corp. v. Mount Lebanon Medical Ctr., Inc.*, 509 A.2d 1256, 1259 (Pa. 1986) (emphasis in original). "Failure of consideration occurs when the consideration bargained for does not pass, in whole or in part, to the promisor." *McGuire v. Schneider, Inc.*, 534 A.2d 115, 118 (Pa. Super. 1987), *aff'd without opinion*, 548 A.2d 1223 (Pa. 1988) (per curiam).

Failure of consideration is a meritorious defense for which a confessed judgment can be opened. In this case, however, we are unable to hold that the district court abused its discretion when it concluded that there was no failure of consideration. We agree with the district court that Hill's promise to lend money to Forest Grove, a corporation the Isenharts owned, was sufficient consideration for the Surety Agreement. *See Flemister v. United Bonding Ins. Co.*, 177 S.E.2d 182, 184 (Ga. Ct. App. 1970); *Miners' State Bank v. Auksztokalnis*, 128 A. 726, 728 (Pa. 1925); *Whitten v. Alling & Cory Co.*, 526 S.W.2d 245, 248 (Tex. Civ. App. 1975).

We also think that the interpretation Forest Grove and the Isenharts seek to put on the language of the Commitment Letter concerning disbursement of funds ignores the letter's plain language. It states that Hill was to disburse funds "as spaces are completed and leased up." App. at 74. We do not believe this is

ambiguous; nor do we think that the record could support a finding that Hill breached this part of the agreement. Thus, we conclude that Forest Grove and the Isenharts have failed to point to facts sufficient to support their allegation that the confessed judgment should fail for lack of consideration.[6] We thus affirm the district court's decision to deny their motion to open or strike the confessed judgment on this ground.

C. *Due Process and Validity of Confession as to Mrs. Isenhart*

Mrs. Isenhart separately contends that the district court erred when it refused to grant her motion to strike or open the confessed judgment against her. She contends that the district court erred in concluding that the Power of Attorney which she executed gave her attorney-in-fact the power to execute documents on her behalf containing a confession of judgment clause. She also contends that the district court erred when it concluded that the confession of judgment did not violate her constitutional right to due process. Finally, she contends that the district court erred in failing to strike the confession of judgment because the complaint in confession of judgment did not attach any document that contained her signature and thus the judgment was invalid on its face.

In contending that the district court erred as a matter of law when it determined that Mrs. Isenhart's Power of Attorney granted Mr. Isenhart the power to execute, on her behalf,

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6. Because we decide Forest Grove's and the Isenharts' claim on this ground, we do not reach the question of whether the district court correctly held that *D'Oench, Duhme &, Co. v. FDIC*, 315 U.S. 447 (1942) precluded them from asserting a lack of consideration as a defense to the confession of judgment.

documents which contained a confession of judgment clause, Mrs. Isenhart argues that an attorney-in-fact does not have that power unless it is expressly set out in the Power of Attorney. Because the Power of Attorney which Mrs. Isenhart executed did not have an express provision authorizing confessions of judgment, she contends any confession of judgment obtained on the basis of the Power of Attorney must fail.

The Restatement (Second) of Agency states:

> It is inferred that one having authority to borrow has authority to do what is reasonably necessary in obtaining the money . . . . It does not, however, include authority to give security or to give a judgment note.

Restatement (Second) of Agency § 75 cmt. b (1958). It is also the general rule that:

> An agent may execute a warrant of attorney to confess Judgment against his principal where he is expressly authorized to do so . . . .
>
> In the absence of express authority, the power of an agent to execute a warrant of attorney to confess judgment against his principal has generally not been inferred . . . . This rule that an agent ordinarily is without power to execute a warrant of attorney to confess judgment unless such authority is expressly conferred has been held applicable even where an agent was granted the power to

> borrow money for his principal or to execute notes, mortgages, bonds, or other securities to secure debts of his principal . . . .

C.P. Jhong, Annotation, *Agent's Authority to Execute Warrant of Attorney to Confess Judgment Against Principal,* 92 A.L.R.2d 952, 953-54 (1963) (footnotes omitted).

In *Armen v. Frederick,* 59 Pa. D. & C. 115 (Beaver Co. 1947), a husband granted his wife a power of attorney. This power of attorney authorized her:

> to do and perform all matters and things, transact all business, make, execute and acknowledge all contracts, orders, deeds, writings, assurances and instruments which may be requisite or proper to effectuate any matter or thing appertaining or belonging to me, and especially granting to her the power to apply for and renew my restaurant liquor license . . . .

Id. at 116. The wife signed a note to borrow money on behalf of her husband who was stationed overseas in the military. It contained a confession of judgment clause. In considering the effect of the power of attorney, the trial court stated "[p]ermission to another to authorize confession of judgment must be expressed in unequivocal language." *Id.* at 125. The court concluded that the power of attorney did not include this type of authorization, and therefore struck the confessed judgment. *Id.*

Similarly, in *Peoples Barking Co. v. Brumfield Hay & Grain Co.,* 179 N.E.2d 53 (Ohio 1961), the Supreme Court of Ohio stated:

> Although an agent with authority to borrow money may have authority to do what is reasonably necessary to obtain that money, including authority to give negotiable instruments in the usual form where required, such authority alone will not support a reasonable inference of authority to give any warrant of attorney to confess judgment.

Id. at 55 (citing Restatement (Second) of Agency § 75 cmt. b). The court held that "the authority of one to execute a warrant of attorney to confess judgment against another should not be recognized unless expressly conferred." *Id.*

We too think it is clear that an attorney-in-fact lacks the power to execute a warrant of attorney to confess judgment on behalf of his principal, unless the power is expressly given in the power of attorney. The Power of Attorney that Mrs. Isenhart executed does not have such a provision, and therefore Mr. Isenhart, as her attorney-in-fact, did not have any power to give Hill, or RTC as its successor, a warrant of attorney to confess judgment against Mrs. Isenhart. Accordingly, we hold that the district court erred when it refused to open or strike the confessed judgment as against Mrs. Isenhart.

Having concluded that the Power of Attorney did not give Mr. Isenhart the power to confess judgment against his wife, we decline to reach her other arguments, leaving them for the district court's initial consideration along with any other arguments she may properly raise.

Appendix A

IV.

The district court's order denying Mr. Isenhart's and Forest Grove's motion to open or strike the confessed judgment on the grounds of failure of consideration will be affirmed. The district court's order refusing to open the judgment confessed against Mrs. Isenhart will be reversed and the case will be remanded to the district court for further proceedings consistent with this opinion. Each party shall bear its own costs.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — MEMORANDUM OPINION AND ORDER FILED SEPTEMBER 8, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 92-6707

RESOLUTION TRUST CORPORATION, as receiver of HILL FINANCIAL, S.A.

v.

FOREST GROVE, INC.; RONALD ISENHART, a/k/a RON W. ISENHART, and DELORES A. ISENHART

MEMORANDUM

J. M. KELLY, J. SEPTEMBER 7, 1993

Presently before the court is Defendants' Motion for Relief from Judgment Pursuant to Rule 60 and Rule 62 of the Federal Rules of Civil Procedure, Motion to Strike Judgment and Motion to Open Judgment. This court has jurisdiction over this matter pursuant to 12 U.S.C. § 1441a(l)(1) and 28 U.S.C. § 1331.[1]

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1. The Financial Institutions Reform, Recovery and Enforcement Act of 1989 provides:

> Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the [Resolution Trust Corporation] is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding.

12 U.S.C. § 1441a(l)(1).

Appendix B

In 1986, Forest Grove, Inc. ("Forest Grove") approached Hill Financial, S.A. ("Hill") for a loan in the amount of $1,815,000 to finance construction of a mobile home park. At the time Forest Grove applied for this loan, its principals — Defendant Ron Isenhart, as well as Robert Quick and William Dougherty—were already customers of Hill, which had extended over $9.5 million in loans involving one or more of these principals.

Hill agreed to the loan commitment of $1,815,000 million. Specifically, it agreed to disburse a maximum of $660,000 at settlement, and the balance was to be escrowed and disbursed as spaces in the mobile home project were completed. As part of the loan agreement, Hill also required each of the principals to endorse the loan, and to submit their personal financial and income statements. The financial statement Ron Isenhart submitted listed only property held jointly with his wife, Defendant Delores Isenhart. As a condition of the loan, Hill required that Ron and Delores Isenhart co-sign a Suretyship Agreement.

The Suretyship Agreement is a four-page document which contains a confession of judgment clause.[2] On November 12,

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2. The confession of judgment clause provides:

> The Surety hereby irrevocably authorizes the Prothonotary or any attorney of any court of record to appear for and confess judgment against the Surety for the amount set forth under Principal Debtor's Liabilities to Hill with or without default by either Surety or Principal Debtor, with five percent (5%) thereof added as reasonable attorneys' commission with costs of suit and release of errors.

1986, Ron Isenhart signed the Suretyship Agreement, and, pursuant to a power of attorney executed by his spouse, signed on behalf of Delores Isenhart, as well. On the same date, Forest Grove signed a Bond and Warrant in connection with the loan. This Bond and Warrant incorporated the terms and conditions of Hill's commitment letter and contained its own confession of judgment clause.[3] After May, 1988, Forest Grove ceased making demands on the loan commitment.

On October 12, 1989, the Office of Thrift Supervision declared Hill insolvent and appointed the Resolution Trust Corporation ("RTC") as its receiver. In 1989, Forest Grove failed to meet its monthly obligations as they fell due. On February 2, 1990, the RTC notified Forest Grove that it was in default on its loan obligations. On November 20, 1992, the RTC, as receiver of Hill, filed its Complaint seeking a confessed judgment against the Defendants. On November 25, 1992, judgment by confession was ordered against Defendants.

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3. The confession of judgment clause in the Bond and Warrant provided, in all capitals, as follows:

> AND FURTHER, OBLIGOR HEREBY AUTHORIZES AND EMPOWERS THE PROTHONOTARY, CLERK OR ANY ATTORNEY OF ANY COURT OF RECORD OF THE COMMONWEALTH OF PENNSYLVANIA, . . . TO APPEAR FOR OBLIGOR AND, WITH OR WITHOUT A DECLARATION FILED, TO CONFESS OR ENTER A JUDGMENT IN THE NAME OF AND AGAINST OBLIGOR AND IN FAVOR OF OBLIGEE, FOR THE ORIGINAL PRINCIPAL SUM ABOVE-MENTIONED WITH COSTS OF SUIT, AND FULL RELEASE OF ALL ERRORS.

Appendix B

Defendants now move to set aside the judgment based on several grounds. Ron and Delores Isenhart (collectively the "Isenharts") assert that the confession of judgment clause violates their due process rights and is unconscionable. The Isenharts also allege that they did not knowingly and intelligently waive their rights. Additionally, they assert that the loan agreement violates the Equal Credit opportunity Act ("ECOA"), 15 U.S.C. § 1691, and that they received no consideration for signing the Suretyship Agreement. All Defendants assert that Hill breached the loan agreement and that such breach constitutes a failure of consideration. Finally, Delores Isenhart asserts that she never executed the Suretyship Agreement and that she never authorized a confession of judgment against her.

A petition in federal court to open or strike a confessed judgment is governed procedurally by Federal Rule of Civil Procedure 60(b). *Central W. Rental Co. v. Horizon Leasing*, 967 F.2d 832, 836 (3d Cir. 1992); *Girard Trust Bank v. Martin*, 557 F.2d 386, 389-90 (3d Cir.), *cert. denied*, 434 U.S. 985 (1977). Rule 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for ... any ... reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b). Relief under Rule 60(b) should be granted only in exceptional circumstances. *Boyd v. Bulala*, 905 F.2d 764, 769 (4th Cir. 1990). A confessed judgment should be set aside under Rule 60(b) only where the Defendants have alleged facts which, if established at trial, would constitute a meritorious

defense to the cause of action. *Horizon Leasing*, 967 F.2d at 836 (citing *United States v. $55.518.05 in U.S. Currency*, 728 F.2d 192, 195 (3d Cir. 1984)).

Defendants have failed to state a meritorious defense warranting opening the confessed judgment entered against them. The United States Supreme Court has upheld the constitutionality of confession of judgment clauses in commercial contracts when the party has knowingly and intelligently waived its rights. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972).

Defendants Ron and Delores Isenhart claim that they did not knowingly and intelligently waive their rights. Ron Isenhart was an experienced businessperson and borrower as evidenced by his borrowing, along with the other principals of Forest Grove, $9.5 million from Hill prior to applying for the loan that is the subject of this action. Ron Isenhart does not allege that he suffered an unfair disadvantage or lacked equal bargaining power with Hill. Moreover, the confession of judgment clauses in both the Suretyship Agreement and the Bond and Warrant were prominently displayed and clearly written. This court finds that Ron Isenhart knowingly and intelligently waived his rights when he agreed to the confession of judgment provisions.

Delores Isenhart claims that she did not knowingly and intelligently waive her rights and thus, her due process rights were violated. Mrs. Isenhart claims that her due process rights were violated because she never signed the Suretyship Agreement which contained the confession of judgment clause, but instead, authorized, her husband to sign on her behalf by means of a power of attorney. When Mrs. Isenhart executed the power of attorney appointing her husband as her attorney, she

gave him the authority to exercise broad powers, including the authority to sign the Suretyship Agreement on her behalf. Specifically, the power of attorney authorizes Ron Isenhart, *inter alia,* to engage in the following activities on behalf of his wife:

> 5. To borrow any sum or sums of money, at such rates of interest, and upon such terms, provisions and conditions as my said attorney may think proper, and for such purposes to sign, seal, acknowledge and deliver any notes, drafts, acceptances or other obligations, and to sign, seal, acknowledge and deliver mortgages on any of my real or personal property, or any other form of security my attorney may deem proper.
>
> * * *
>
> 8. To enter into, make, sign, execute, deliver, acknowledge and perform all contracts, agreements, writings or things that may in the opinion of my said attorney be necessary or proper to be done, including, but without limiting the generality of the foregoing, any agreements involving medical, maintenance, support, educational or emergency expenditures on behalf of myself or persons designated by my said attorney.
>
> * * *
>
> 20. Without in any manner limiting the foregoing, generally to do, execute and

> perform any other act, deed, matter or thing of every nature and kind whatsoever, that ought to be done, executed and performed, or that, in the opinion of my said attorney ought to be done, executed or performed in and about the premises, as fully and effectively as I could do if personally present.

(General Power of Attorney dated Nov. 12, 1986 and attached to Pl.'s Mem. Law Opp. to Def.'s Mot.).

This court finds that the power of attorney was sufficiently broad to authorize Mr. Isenhart to sign the Suretyship Agreement on Mrs. Isenhart's behalf. This court also finds that Mrs. Isenhart knowingly and intelligently waived her rights under the confession of judgment clause by appointing Ron Isenhart as her attorney-in-fact.

The Isenharts' assertion that the confession of judgment clause is unconscionable is likewise unmeritorious. As stated above, the United States Supreme Court has upheld the constitutionality of confession of judgment clauses. *D.H. Overmyer Co., supra.* The confession of judgment clause in this case was clearly not unconscionable to Mr. Isenhart, an established businessperson.

The Isenharts also seek Rule 60(b) relief based upon the grounds that Hill violated the Equal Credit Opportunity Act ("ECOA"); 15 U.S.C. § 1691. This court finds that no ECOA violation occurred in this case. ECOA regulations provide that a lender may require a spouse's signature where, pursuant to state marital property laws, a credit applicant does not have sufficient property, separate from the community property, to meet the

lender's standards for creditworthiness. 12 C.F.R. § 202.7(d)(3).[4]

Under Pennsylvania law, spouses presumptively hold property as tenants by the entireties. *In re DiPietro,* 135 B.R. 773, 777 (Bankr. E.D. Pa. 1992); *Constitution Bank v. Olson,* 620 A.2d 1146, 1149 (Pa. Super Ct. 1993). It is well-settled in Pennsylvania that a spouse may not encumber property held as tenants by the entireties without the other spouse's consent. *Howard Savings Bank v. Cohen,* 607 A.2d 1077, 1079-80 (Pa. Super. Ct. 1992). Thus, under Pennsylvania law, Hill could obtain security in Ronald Isenhart's marital property only by having Delores Isenhart's signature as co-guarantor. The evidence of creditworthiness Ronald Isenhart submitted to Hill listed only

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4. 12 C.F.R. § 202.7(d)(3) provides:

> (3) *Unsecured credit-community property states.* If a married applicant requests unsecured credit and resides in a community property state . . . a creditor may require the signature of the spouse on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the community property available to satisfy the debt if:
>
> > (i) Applicable state law denies the applicant power to manage or control sufficient community property to qualify for the amount of credit requested under the creditor's standards of creditworthiness; and
> >
> > (ii) The applicant does not have sufficient separate property to qualify for the amount of credit requested without regard to community property.

property held jointly with his wife. The financial statement of personal net worth Ron Isenhart submitted to Hill was in the name of "Ron W. and Delores A. Isenhart," and listed only jointly held property.

This court finds that because Ron Isenhart did not advise Hill of any property he owned separately, and because under Pennsylvania law, Hill could not reach any of Ron Isenhart's jointly held property unless Delores Isenhart cosigned, no ECOA violation occurred.

All of the Defendants assert that Hill refused to fund the full amount of the loan commitment, and that such refusal affords them the defense of failure of consideration. Additionally, Ron and Delores Isenhart each asserts that consideration was lacking to support their obligations under the Suretyship Agreement.

The Defendants assert that Hill refused to lend the total funds committed to Forest Grove in response to a cost analysis for the completion of the mobile home pads. As reflected in the commitment letter, however, Hill never agreed to pre-fund the construction project. Hill agreed to disburse funds "as spaces are completed and leased." (*See* Commitment Letter dated October 1, 1986, attached to Pl.'s Mem. Law Opp. to Def.'s Mot. as Exhibit "B"). The terms and conditions of the Commitment Letter were expressly incorporated in the agreements signed by the parties. The Defendants do not assert that Hill refused to disburse funds as spaces were completed. This court finds that Hill did not breach the loan agreement by failing to disburse loan proceeds prior to the completion of spaces in the mobile home park.

Ron and Delores Isenhart allege that they received no

consideration in exchange for their execution of the Suretyship Agreement. These allegations are unmeritorious. In reliance on Ron Isenhart's agreement to sign the Suretyship Agreement, Hill agreed to lend his company $1.8 million. Additionally, Ron Isenhart's agreement to act as surety was essentially worthless unless his wife co-signed. Hill relied on Delores Isenhart's execution of the Suretyship Agreement in exchange for its approval of the loan. Courts have consistently found that a guarantor or surety has received consideration in such circumstances. *Miners' State Bank v. Auksztokalnis,* 128 A. 726, 728 (Pa. 1925). Moreover, Defendants are precluded from asserting a lack of consideration defense against the RTC as a result of the *D'Oench Duhme* Doctrine. *CMF Virginia Land. L.P. v. Brinson,* 806 F. Supp. 90, 94 (E.D. Va. 1992) (citing *D'Oench. Duhme & Co. v. FDIC,* 315 U.S. 447, 459-60 (1942); *Taylor Trust v. Security Trust Fed. Sav. & Loan,* 844 F.2d 337, 342 (6th Cir. 1988)).

Delores Isenhart asks that the judgment against her be struck as facially defective because her signature is not on any document attached to Plaintiff's Complaint in confession of judgment. She claims that she never authorized a confession of judgment against her. As shown above, however, Mrs. Isenhart authorized her husband to enter into the Suretyship Agreement containing the confession of judgment. Mr. Isenhart's signature on the Suretyship Agreement is sufficient to satisy the requirements of Pennsylvania procedural law. More importantly, however, this court does not believe Pennsylvania procedural law is applicable in this action. *See AmQUIP Corp. v. Pearson,* 101 F.R.D. 332,

Appendix B

335-36 (E.D. Pa; 1984) (Pennsylvania Rules of Civil Procedure prescribe procedure in Pennsylvania courts, in federal courts, Federal Rule 60(b) applies).

Defendants have not adduced facts which, if established, would constitute a meritorious defense in this action. Accordingly, Defendnts' Motion will be denied.

An appropriate Order follows.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 92-6707

RESOLUTION TRUST CORPORATION, as receiver of HILL FINANCIAL, S.A.

v.

FOREST GROVE, INC.; RONALD ISENHART, a/k/a RON W. ISENHART, and DELORES A. ISENHART

ORDER

AND NOW, this 7th day of September, 1993, in consideration of Defendants' Motion for Relief from Judgment Pursuant to Rule 60 and Rule 62 of the Federal Rules of Civil Procedure, Motion to Strike Judgment and Motion to Open Judgment; Plaintiff's Memorandum in Opposition thereto; oral argument held on this matter; and the foregoing Memorandum; it is hereby ORDERED that Defendants' Motion is DENIED.

BY THE COURT:

s/ James McGirr Kelly
JAMES McGIRR KELLY, J.

APPENDIX C — EXCERPTS FROM RECORD OF THE LOWER COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 92-

RESOLUTION TRUST CORPORATION
AS RECEIVER OF HILL FINANCIAL, S.A.,
P.O. Box 1500
Valley Forge, PA 19482-1500

Plaintiff

v.

FOREST GROVE, INC.,
c/o Barros, McNamara, Scanlon,
Malkiewicz & Taylor
2 West Loockerman Street
Dover, DE 19903-1298
and
RONALD ISENHART a/k/a RON W.
ISENHART and DELORES A. ISENHART
7 Hillside Drive
Quakertown, PA 18951

Defendants

CONFESSION OF JUDGMENT

COMPLAINT

Appendix C

COUNT I

1. This Court has jurisdiction of this matter pursuant to 12 U.S.C. Section 1441a(1)(1). This action is brought by the Resolution Trust Corporation ("RTC") solely in its capacity as Receiver of Hill Financial Savings and Loan Association ("Hill Financial").

2. Forest Grove, Inc. ("Defendant Forest Grove") is a Delaware corporation having an office in Kent County, Delaware.

3. Hill Financial is a savings and loan association chartered under the laws of the State of Pennsylvania, the accounts of which are insured by the Federal Deposit Insurance Corporation ("FDIC"). The RTC is Receiver of Hill Financial, pursuant to Office of Thrift Supervision Order No. 89-292 dated October 12, 1989, a copy of which is attached hereto as Exhibit "A".

4. Among the assets and liabilities of Hill Financial transferred and assigned to RTC as Receiver of Hill Financial were a Mortgage dated November 12, 1986, ("Mortgage"), in the original amount of $1,815,000.00, executed by Robert Quick and Ron Isenhart on behalf of Forest Grove, Inc. ("Obligor"), a Bond and Warrant executed by Robert W. Quick and Ron W. Isenhart on behalf of Forest Grove, Inc., a Security Agreement executed by Ron W. Isenhart and Delores A. Isenhart, and a Suretyship Agreement executed by Ronald Isenhart and Delores A. Isenhart. A true and correct copy of the Mortgage is attached hereto as Exhibit "B".

5. The Mortgage is in default.

Appendix C

6. The aforesaid Bond and Warrant contains a warrant of attorney which allows confession of judgment in Pennsylvania against the obligor. A true and correct copy of the Bond and Warrant is attached hereto as Exhibit "C".

7. There has been no assignment of the Bond and Warrant.

8. Judgment has not been entered on said Bond and Warrant in any other jurisdiction.

9. The Bond and Warrant on which this judgment is based authorizes the entry of judgment in Pennsylvania as of any term.

10. Determination of the amount due on said instrument is as follows:

Outstanding Principal Balance	$1,209,734.30
Accrued Interest (to 11/12/92)	368,414.51
Unpaid Late Charges	28,097.27
Attorney ' s Collection Fee	50,000.00
Total	$1, 656, 266. 08

WHEREFORE, as authorized in the Bond and Warrant appearing in the attached instrument, Plaintiff demands judgment by confession against Defendant Forest Grove, Inc. in the sum of $1,656,266.08 plus costs of suit and plus interest and late charges accruing hereafter until such judgment is paid in full, and such other general and equitable relief as the Court deems reasonable.

COUNT II

11. Plaintiff repeats and realleges the allegations set forth in

paragraphs 1 through 10 of Count One, which are incorporated by reference herein.

12. Defendant, Ronald Isenhart a/k/a Ron W. Isenhart ("Defendant Ron Isenhart") is a natural person residing at 7 Hillside Drive, Quakertown, Bucks County, Pennsylvania 18951.

13. Defendant Delores A. Isenhart ("Defendant Delores Isenhart") is a natural person residing at 7 Hillside Drive, Quakertown, Bucks County, Pennsylvania 18951.

14. The Suretyship Agreement executed by Ronald Isenhart and Delores A. Isenhart dated November 12, 1986, contains a Warrant of Attorney to Confess Judgment, in an amount not exceeding $1,815,000.00 plus interest and costs, as well as expenses including reasonable counsel fees. A true and correct copy of the Suretyship Agreement is attached hereto as Exhibit "D" and made a part hereof.

15. There has been no assignment of the aforesaid Suretyship Agreement.

16. Judgment has not been entered on the aforesaid Suretyship Agreement in any other jurisdiction.

17. As a consequence of the foregoing the following amounts are due and owing under the Suretyship Agreement as of November 12, 1992:

Outstanding Principal Balance	$1,209,734.30
Accrued Interest to 11/12/92	$ 368,414.51
Unpaid Late Charges	$ 28,097.27
Attorney's Collection Fee	$ 50,000.00
Subtotal	$1,655,256.08

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18. Interest continues to accrue at the per diem default rate of $445.25.

WHEREFORE, as authorized by the warrants appearing in the attached instruments, Plaintiff demands judgment by confession against Defendants Ron W. and Delores A. Isenhart, jointly and severally in the sum of $1,656,266.08 plus costs of suit, and plus interest and late charges accruing hereafter until such judgment is paid in full, and such other general and equitable relief as the Court deems reasonable.

s/ Marjorie E. Greenfield
Marjorie E. Greenfield
Identification No. 6-9240
ANDERSON & GREENFIELD
1025 Penn Mutual Tower
510 Walnut Street
Philadelphia, PA 19106-3610
(215) 627-0789

Attorney for Plaintiff, Resolution Trust Corporation, as Receiver of Hill Financial, S.A.

Dated: November 20, 1992

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
No. 92-cv-6707

RESOLUTION TRUST CORPORATION
AS RECEIVER OF HILL FINANCIAL, S.A.,
P.O. Box 1500
Valley Forge, PA 19482-1500

Plaintiff

v.

FOREST GROVE, INC.,
c/o Barros, McNamara, Scanlon,
Malkiewicz & Taylor
2 West Loockerman Street
Dover, DE 19903-1298

and

RONALD ISENHART a/k/a RON W.
ISENHART and DELORES A. ISENHART
7 Hillside Drive
Quakertown, PA 18951

Defendants

CONFESSION OF JUDGMENT

Appendix C

ORDER

Judgment by Confession is hereby entered in favor of Resolution Trust Corporation, solely in its capacity as Receiver of Hill Financial, S.A., and against Forest Grove, Inc. and Ronald Isenhart a/k/a Ron W. Isenhart and Delores A. Isenhart, jointly and severally, in the amount of $1,656,266.08 plus costs of suit, and plus interest and late charges accruing hereafter until the judgment is paid in full.

s/ By the Court
Attest: Robert E. Gohery
Deputy Clerk

[stamped]
A TRUE COPY CERTIFIED TO FROM THE RECORD
DATED: *November 25, 1992*
ATTEST: *Joan Cair*
Deputy Clerk United States District Court
Eastern District of Pennsylvania

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 92-CV-6707

[stamped]
FILED JAN 12 1993

RESOLUTION TRUST CORPORATION
AS RECEIVER OF HILL
FINANCIAL, S.A.,
P.O. Box 1500
Valley Forge, PA 19482-1500

Plaintiff

v.

FOREST GROVE, INC.,
c/o Barros, McNamara, Scanlon,
Malkiewicz & Taylor
2 West Loockerman Street
Dover, DE 19903-1298

and

RONALD ISENHART a/k/a RON W.
ISENHART and DELORES A. ISENHART
7 Hillside Drive
Quakertown, PA 18951

Defendants

CONFESSION OF JUDGMENT

Appendix C

DEFENDANTS' MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60 AND RULE 62 OF THE FEDERAL RULES OF CIVIL PROCEDURE; MOTION TO STRIKE JUDGMENT AND MOTION TO OPEN JUDGMENT

AND NOW, Forest Grove, Inc., Ron Isenhart and Delores A. Isenhart, by their counsel, Wisler, Pearlstine, Talone, Craig, Garrity & Potash, move this Court as follows:

1. Forest Grove, Inc. is a Delaware corporation having an office in Kent County, Delaware.

2. Hill Financial, S.A. is a savings and loan association chartered under the laws of the Commonwealth of Pennsylvania, the accounts of which are insured by the Federal Deposit Insurance Corporation ("FDIC").

3. The Resolution Trust Corporation ("RTC") is the receiver of Hill Financial pursuant to an Office of Thrift Supervision Order.

4. Pursuant to the Complaint filed in the instant matter on or about November 20, 1992, judgment by confession was ordered against Defendants on or about November 25, 1992. True and correct copies of Plaintiff's Complaint and the Orders issued by this Court pursuant to the Complaint are attached hereto collectively as Exhibit "AA" and made a part hereof.

5. The Suretyship Agreement attached to Plaintiff's Complaint as Exhibit "D" is the instrument pursuant to which judgment was confessed against Defendants Ron Isenhart and Delores A. Isenhart, and it provides in Paragraph 15:

> All issues arising hereunder shall be governed and determined by the laws of the Commonwealth of Pennsylvania.

(The Suretyship Agreement is the last exhibit attached to this Motion as Exhibit II for ease of reference.)

COUNT I - MOTION OF DELORES ISENHART TO STRIKE JUDGMENT ENTERED AGAINST HER

6. Plaintiffs' judgment against Delores Isenhart is defective on its face. Judgment against Delores Isenhart was confessed pursuant to the terms of a Suretyship Agreement, a copy of which is attached to Plaintiff's Complaint as Exhibit "D". That Suretyship Agreement allegedly bears the signature of Ronald Isenhart and Delores A. Isenhart by Ronald Isenhart, her attorney-in-fact. Plaintiff's Complaint in Paragraph 4 alleges that Delores A. Isenhart executed the Suretyship Agreement when it is clear from the instrument itself that Delores Isenhart did not execute it. Moreover, the Complaint does not contain a copy (or in any other way allege the existence) of a power of attorney duly executed by Delores Isenhart granting Ronald Isenhart the authority to authorize a confession of judgment against Delores Isenhart.

7. Rule 2952 of the Pennsylvania Rules of Civil Procedure is a substantive rule requiring that a confession of judgment shall include:

> (b) the original or a photostatic copy or like reproduction of the instrument showing the defendant's signature; if the original is not attached, an averment that the copy attached

> is a true and correct reproduction of the original; if neither the original nor a reproduction can be attached, an explanation why they are not available . . .

8. Defendant Delores Isenhart's signature is not on any document attached to Plaintiff's Complaint in confession of judgment. Moreover, Delores Isenhart never authorized a confession of judgment against her.

9. The confession of judgment clause contained in Paragraph 7 of the Suretyship Agreement, a copy of which is attached to the Complaint as Exhibit "D", is unconstitutional: It is not conspicuous and does not in any way stand out from the Suretyship Agreement itself; it fails to warn the signer of the effect of the confession of judgment clause, and it attempts to deprive the signer of the Suretyship Agreement of due process under the laws of the Commonwealth of Pennsylvania and the United States of America. Additionally, the confession of judgment clause is unconscionable.

WHEREFORE, Delores Isenhart respectfully requests that this Court strike the judgment entered against her.

COUNT II - MOTION OF DELORES ISENHART TO OPEN THE JUDGMENT ENTERED AGAINST HER

10. Delores Isenhart incorporates herein by reference the allegations contained in Paragraphs 1-9 above, as if the same were fully set forth herein.

11. Delores Isenhart made no knowing and intelligent waiver of her rights so as to permit confession of judgment against her in the instant matter pursuant to the Suretyship

Agreement, a copy of which is attached as Exhibit "D" to Plaintiff's Complaint.

12. Plaintiff's entry of judgment against Delores Isenhart is in violation of the Equal Credit Opportunity Act, 15 U.S.C.§ 1691. Delores Isenhart never made an application to Hill Financial for the loan which is the subject of this lawsuit. She never signed any documents with Hill Financial with respect to the subject loan. Further, no reason was ever given by Hill Financial as to why any application submitted by her husband, Ron Isenhart, was insufficient so as to require the signature of Delores Isenhart allegedly obligating her to Hill Financial in connection with the subject loan. Hill Financial never disclosed the specific reasons for denying Ron Isenhart the credit he requested without the signature of Delores Isenhart.

13. Delores Isenhart is entitled to recoupment for any damages she sustains as a result of Plaintiff's allegations against her pursuant to Plaintiff's violation of the Equal Credit Opportunity Act.

14. Delores Isenhart received no consideration in exchange for the Suretyship Agreement, a copy of which is attached as Exhibit "D" to Plaintiff's Complaint and such Suretyship Agreement is the alleged basis for Delores Isenhart's obligations to Hill Financial and its successor-in-interest.

WHEREFORE, Delores Isenhart respectfully requests that this Court open the judgment entered against her and, after hearing, dismiss the judgment against her for the reasons set forth above.

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COUNT III - MOTION OF RON ISENHART TO STRIKE THE JUDGMENT ENTERED AGAINST HIM

15. The confession of judgment clause contained in Paragraph 7 of the Suretyship Agreement, a copy of which is attached to the Complaint as Exhibit "D" is unconstitutional: It is not conspicuous and does not in any way stand out from the Suretyship Agreement itself; it fails to warn the signer of the effect of the confession of judgment clause, and it attempts to deprive the signer of the Suretyship Agreement of due process under the laws of the Commonwealth of Pennsylvania and the United States of America. Moreover, the confession of judgment clause was never explained to Mr. Isenhart and is unconscionable. Mr. Isenhart never received a copy of the Suretyship Agreement (and other Loan Documents) before the day of closing on November 12, 1986. He never received a copy after closing.

WHEREFORE, Ron Isenhart respectfully requests that this Court strike the judgment entered against him in the instant matter.

COUNT IV - MOTION OF RON ISENHART TO OPEN THE JUDGMENT ENTERED AGAINST HIM

16. Ron Isenhart incorporates herein by reference the allegations contained in Paragraph 15 above, as if the same were fully set forth herein.

17. Ron Isenhart did not knowingly or intelligently waive his rights pursuant to Paragraph 15 of the Suretyship Agreement, a copy of which is attached to Plaintiff's Complaint as Exhibit "D".

18. Ron Isenhart received no consideration in exchange for the execution of the Suretyship Agreement, a copy of which is attached to Plaintiff's Complaint as Exhibit "D".

WHEREFORE, Ron Isenhart respectfully requests that this Court open the judgment entered against him in the instant matter and, after hearing, dismiss such judgment for the reasons set forth above.

COUNT V - MOTION OF RON ISENHART, DELORES ISENHART AND FOREST GROVE, INC. TO OPEN THE JUDGMENT ENTERED AGAINST THEM

19. Defendants incorporate by reference the allegations contained in Paragraphs 1 through 18 above, as if the same were fully set forth herein.

20. The amount of the Bond and Warrant, a copy of which is attached to Plaintiff's Complaint as Exhibit "C", is $1,815,000.00.

21. Hill Financial specifically committed to lend Forest Grove, Inc. $1,815,000.00 so that Forest Grove, Inc. could purchase the Forest Grove Mobile Home Park and complete its development for a total of 167 mobile home pads.

22. Hill Financial collected commitment fees for the total loan of $1,815,000.00 from Forest Grove, Inc.

23. As set forth in Plaintiff's Complaint, only approximately $1,210,000.00 (approximately $235,000 of which was interest reserve) was loaned by Hill Financial to Forest Grove, Inc.

24. Hill Financial only loaned Forest Grove, Inc. sufficient funds for the completion of the development of 98 mobile home units.

25. Hill Financial knew that the loan it committed to Forest Grove, Inc. was committed on the basis that the development of all 167 units in the Forest Grove Mobile Home Park was necessary in order to make the project feasible and in order to allow Forest Grove, Inc. to pay back the loan to Hill Financial. Hill Financial knew that without the completion of all 167 units, and in particular, without the completion of the last phase of 69 units, the cost of the acquisition and development of the Forest Grove Mobile Home Park and its infrastructure was too costly to allow for operating income sufficient to allow the project to succeed or to even pay off its loan obligation to Hill Financial.

26. Forest Grove, Inc. specifically requested in 1988 that Hill Financial lend the total funds committed to Forest Grove, Inc. so that Forest Grove, Inc. could complete the development of the Forest Grove Mobile Home Park project. At the request of Hill Financial, Forest Grove, Inc. specifically prepared a cost analysis for the completion of pads in the project and a copy is attached hereto as Exhibit "BB" and made a part hereof.

27. After repeated requests, Hill Financial finally refused Forest Grove, Inc. in the fall of 1989.

28. As a result of Hill Financial's failure to lend the monies committed to Forest Grove, Inc. as aforesaid, Forest Grove, Inc. has lost the ability to construct the remaining 69 mobile home pads within the development. Since the loan was committed, laws governing the implementation of on-site sewer systems in Kent County, Delaware have changed, thereby prohibiting construction of the on-site sewer systems designed for the

remaining 69 units in the Forest Grove Mobile Home Park project.

29. As a result of Hill Financial's refusal to lend the monies committed to Forest Grove, Inc. as aforesaid, Forest Grove, Inc. has lost rentals more particularly outlined in its June 18, 1991 correspondence, a true and correct copy of which is attached hereto as Exhibit "CC" and made a part hereof.

30. Since 1989, Forest Grove, Inc. has attempted to contact Hill Financial and/or the RTC in order to explain the drastic effects of Hill Financial's failure to meet its loan commitment and to explore: (i) the possibility of resetting the loan; (ii) the possibility of arranging for a sale of the Forest Grove Mobile Home Park; or (iii) the possibility of obtaining funds to complete the project.

31. Hill Financial and RTC have failed and refused to reply to Forest Grove, Inc.'s attempts.

32. The responses of RTC and/or its authorized agents to the requests of Forest Grove, Inc. since 1989 have been late, unresponsive to the issues, and in some instances, totally confused.

(a) On March 5, 1991, Ralph Edgar Group (Deborah E. Harry) wrote to the Isenharts with respect to what appears to be the Forest Grove, Inc. loan. The letter was addressed to *William* G. and Delores Isenhart and related to asset numbers about which *Ron* Isenhart knew nothing. A true and correct copy of this correspondence is attached hereto as Exhibit "DD" and made a part hereof.

(b) Shortly thereafter, another letter was sent to Forest Grove, Inc. by Knutson Mortgage Corp. which appeared to relate to the Forest Grove, Inc. loan. That letter bore a different loan number. A true and correct copy of this correspondence is attached hereto as Exhibit "EE" and made a part hereof.

(c) As a result, Ron Isenhart forwarded correspondence dated April 12, 1991 to Ralph Edgar Group, Inc., attention Deborah E. Harry, a true and correct copy of which is attached hereto as Exhibit "FF". Ron Isenhart also forwarded correspondence dated April 12, 1991 to Knutson Mortgage attempting to rectify the confusion. A true and correct copy of this correspondence is attached hereto as Exhibit "GG" and made a part hereof.

33. Finally, on or about June 18, 1991, representatives of Forest Grove, Inc. met with Deborah Harry of the Ralph Edgar Group, the authorized representative of RTC in order to advise of the situation set forth hereinabove. After their meeting with Deborah Harry, and after providing evidence of the commitment made by Hill Financial and the failure of Hill Financial to lend pursuant to the commitment as set forth above, Deborah Harry indicated that the matter would be "straightened out".

34. Shortly thereafter, by correspondence dated July 15, 1991, Deborah Harry advised that she was no longer handling the project. A true and correct copy of the July 15, 1991 correspondence is attached hereto as Exhibit "HH" and made a part hereof.

35. Forest Grove, Inc. attempted to contact Deborah Harry in order to determine who would be handling the project, and Forest Grove, Inc. was directed to Merrill Friedman.

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36. Representatives of Forest Grove, Inc. attempted to contact Merrill Friedman without success.

37. Finally, toward the latter part of December, 1991, Merrill Friedman's office advised Forest Grove, Inc. to contact the Graimark Company ("Graimark").

38. Forest Grove, Inc.'s representatives and counsel attempted to contact Graimark in an effort to remediate or otherwise remedy the failure of the Forest Grove Mobile Home Park project. No meaningful response has been forthcoming from Graimark or the RTC.

39. Since 1989, Forest Grove, Inc. has not received statements concerning amounts owed on the subject loan, has been unable to obtain information concerning balances due, and has been totally ignored with respect to its efforts to remediate or otherwise remedy the failure of the Forest Grove Mobile Home Park project as caused by Hill Financial.

40. Forest Grove, Inc., as a result of Hill Financial's failure to fund in accordance with its commitment, has lost the value of a going business in the Forest Grove Mobile Home Park project, has lost its capital invested in the Forest Grove Mobile Home Park project, and has lost all of the fees paid in connection with its loan from Hill Financial which was never fully funded.

41. The actions on the part of Hill Financial, the RTC, and their agents and representatives amount to a failure of consideration under the agreement on which Plaintiff premised its' confession of judgment.

WHEREFORE, Defendants respectfully request that this Court open the judgment entered against them in the instant matter.

Respectfully submitted,

WISLER, PEARLSTINE, TALONE, CRAIG, GARRITY & POTASH

By: s/ Michael J. Clement
MICHAEL J. CLEMENT, ESQUIRE
Office Court at Walton Point
484 Norristown Road
Blue Bell, PA 19422
(215) 825-8400
Attorneys for Defendants

Appendix C

AFFIDAVIT OF DELORES ISENHART IN SUPPORT OF HER MOTION FOR RELIEF FROM JUDGMENT

DELORES ISENHART, being duly sworn according to law, deposes and states:

1. I never received any documents from Hill Financial with respect to a loan to Forest Grove, Inc.

2. Hill Financial neither asked me about my credit nor forwarded any information request to me concerning my credit in connection with a loan to Forest Grove, Inc.

3. I never signed any Hill Financial document with respect to a loan from Hill Financial to Forest Grove, Inc.

4. I do not now have, nor did I ever have, any interest in Forest Grove, Inc.

5. I never made application to Hill Financial for any loan with respect to Forest Grove, Inc.

6. I never received any information or reason as to why Hill Financial required anything from me in connection with a loan applied for by my husband, Ron Isenhart, on behalf of Forest Grove, Inc.

7. Hill Financial never disclosed any reason for denying Ron Isenhart the credit he requested on behalf of Forest Grove, Inc. without my signature.

8. I received nothing in connection with a loan made by Hill Financial to Forest Grove, Inc.

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s/ Delores Isenhart
DELORES ISENHART

Sworn to and subscribed
before me this 7th day
of January, 1993.

s/ Marie F. Swayser
[stamped]
Notary Public
MARIE F. SWAYSER, Notary Public
Norristown, Montgomery Co., PA
My Commission Expires March 11, 1993

Appendix C

AFFIDAVIT OF RON ISENHART IN SUPPORT OF HIS MOTION FOR RELIEF FROM JUDGMENT

RON ISENHART, being duly sworn according to law, deposes and states:

1. I am a shareholder and officer of Forest Grove, Inc., a Delaware corporation.

2. I did not understand that I was signing a Suretyship Agreement with respect to the loan made by Hill Financial to Forest Grove, Inc., the effect of which would be to allow a judgment to be entered against myself and Delores Isenhart without any hearing or other due process rights. The effects of a confession of judgment clause were never explained to me in connection with the documents I executed relating to the loan made from Hill Financial to Forest Grove, Inc. I never received the Suretyship Agreement (as well as other loan documents) prior to the day of closing with Hill Financial on November 12, 1986. I never received a copy of the Suretyship Agreement I allegedly signed until I received the Complaint in this matter.

3. No reason was ever given by Hill Financial as to why any application I submitted on behalf of Forest Grove, Inc. was insufficient so as to require the signature of Delores Isenhart, thereby serving to bind her in connection with the loan from Hill Financial to Forest Grove, Inc.

4. Hill Financial never disclosed any reason for denying the credit I requested on behalf of Forest Grove, Inc. without the signature of Delores Isenhart.

5. I met with Hill Financial on behalf of Forest Grove, Inc.

prior to the closing on the loan in 1986. During those meetings, Hill Financial specifically committed to lend Forest Grove, Inc. the sum of $1,815,000 so that Forest Grove, Inc. could purchase the Forest Grove Mobile Home Park and complete its development for a total of 167 mobile home pads.

6. At all times prior to the loan, Hill Financial knew that the development of all 167 units in the Forest Grove Mobile Home Park was necessary in order to make the project feasible and to generate sufficient income to allow Forest Grove, Inc. to pay back the loan to Hill Financial. Hill Financial knew that without the completion of the last phase of 69 units, the cost of the acquisition and development of the Forest Grove Mobile Home Park and its infrastructure would be too high to allow for the generation of income sufficient to pay off Forest Grove's debts.

7. Hill Financial only actually loaned Forest Grove approximately $1,210,000 (of which approximately $235,000 was for interest reserve) which was sufficient only for the completion of the development of 98 mobile home pads in the Forest Grove Mobile Home Park.

8. Beginning in 1988, Forest Grove, Inc. requested that Hill Financial lend the balance of the total funds committed so that Forest Grove, Inc. could complete the development of the mobile home park project. After repeated requests, Hill Financial finally refused Forest Grove, Inc. in the Fall of 1989. As a result, Forest Grove, Inc. has lost the ability to construct the remaining 69 mobile home pads within the project.

9. I believe that the laws governing on-site sewer systems in Kent County, Delaware have changed and construction of the on-site sewer systems designed for the remaining 69 units in the

Appendix C

Forest Grove Mobile Home Park is not permitted as originally designed.

10. Since Hill Financial's refusal to lend the balance of the loan committed, Forest Grove, Inc. has attempted to contact Hill Financial and/or the RTC in order to explain the effects of Hill Financial's breach of its loan commitment. Forest Grove, Inc. attempted to explore the possibility of resetting the loan, the possibility of arranging for a sale, and the possibility of obtaining funds to complete the project. Forest Grove, Inc. and I kept getting a runaround when we tried to meet with someone in charge of this loan. Finally, in June of 1991, we met with Deborah Harry of the Ralph Edgar Group who was supposed to be the authorized representative of the RTC with respect to the Forest Grove, Inc. loan. We had a long meeting with Deborah Harry, and we explained Hill Financial's failure to finance, whereupon she indicated a willingness to straighten out the matter. However, within four (4) weeks, Deborah Harry was no longer handling the project.

11. As a result of Hill Financial's failure to fund the entire loan to Forest Grove, Inc., Forest Grove, Inc. has lost the value of a going business in the mobile home park project, has lost its capital invested in the mobile home park project, and has lost all the fees it paid in connection with the committed loan which has not been completely fulfilled.

s/ Ron Isenhart
RON ISENHART

Sworn to and subscribed
before me this 7th day
of January, 1993.

Appendix C

s/ Marie F. Swayser
[stamped]
Notary Public
MARIE F. SWAYSER, Notary Public
Norristown, Montgomery Co., PA
My Commission Expires March 11, 1993

Appendix C

RALPH EDGAR GROUP, INC.
Professionals in Real Estate and Finance

March 5, 1991

William G. & Delores Isenhart
1045 N. West Blvd.
Quakertown, PA 18951

RE: Mortgage by: Hill Financial
In favor of: Forest Grove Inc.
Asset No.: 013001143

Dear Mr. & Mrs. Isenhart:

The Resolution Trust Corporation has included the above property in the asset management contract awarded to us as of January 1, 1991. Merrill Freeman of the Northeast Consolidated RTC office is our Oversight Manager should you have any questions (215-631-4789).

Under our contract we need to obtain a current financial statement on you as Guarantor. Please forward to me a copy of your current financial statement, along with copies of your 1988 and 1989 federal income tax returns so that we may properly update our file. Please refer to asset number 013001143 on all correspondence to this office with reference to this matter.

Should you have any questions, please do not hesitate to call.

Sincerely,
s/ Deborah E. Harry
Deborah E. Harry
Supervising Officer

cc: File # 013001143

Appendix C

KNUTSON
MORTGAGE CORPORATION

March 15, 1991

Forest Grove Inc
Robert Quick

1045 North West End Blvd
Quakertown PA 18951

RE: Loan Number: 803643-3
Property Address: Kent County
Quakertown PA 18951

Dear Mortgagor:

Knutson Mortgage Corporation has recently acquired the servicing of your mortgage from Meridian Mortgage Corp. Meridian has cooperated in forwarding the majority of your tax information to Knutson, however we request your assistance in obtaining additional loan and tax information.

We ask that you verify the mailing and property address listed on this letter and also provide us with your day time phone number. In addition, we request original or copies of 1990 tax receipt(s) or current tax bill(s) from the taxing authority(s) for County, City, School, etc. that collect taxes for your property. Obtaining this information will avoid tax penalties and prevent you from receiving delinquent notices from taxing authorities. We have enclosed a postage-paid envelope for your convenience.

Please contact us at the toll free number listed below if you have

any questions. Your prompt attention to this matter is greatly appreciated.

Sincerely,

Knutson Mortgage Corp.
Customer Service
1-800-648-4800

TX005 005

SDL

Appendix C

FOREST GROVE, INC.
P.O. BOX 233, HARTLY, DELAWARE 19953 (302) 492-8404
Builders/Developers

April 12, 1991

Ralph Edgar Group Inc.
218 N. 9th St.
Allentown, PA 18102

ATTN: Deborah E. Harry

RE: File #013001143

Dear Ms. Harry:

In regard to your letter of March 5, 1991, we require a clarification.

1. The file number referenced is 013001143. Is this the same as #1301143 (Meridian).

2. Is this the same file being serviced by Knutson Mortgage Corp. #803643-3?

3. Will this file be serviced by Knutson or Ralph Edgar Group Inc.?

Thank you for your assistance in this matter.

Sincerely,

s/ Ron W. Isenhart
Ron W. Isenhart
1045 N. West End Blvd.
Quakertown, PA 18951

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FOREST GROVE, INC.
P.O. BOX 233, HARTLY, DELAWARE 19953 (302) 492-8404
Builders/Developers

April 12, 1991

Knutson Mortgage Corp.
3001 Metro Drive, Suite 400
Minneapolis, Minn. 55425-9863

RE: Forest Grove Inc.

Dear Sirs:

We have received your letter of March 15, 1991 and we would appreciate clarification of the following:

1. Your letter made reference to property located in "Kent County, Quakertown, PA 18951". Is this the property located in Kent County, Hartly, Del.?

2. We do not recognize the loan No. 803643.3. Could you please identify whose No. this is?

3. Is is possible that this is the same account that is being serviced by Ralph Edgar Group?

Thank you for your assistance in this matter.

Sincerely,

s/ Ron W. Isenhart
1045 N. West End Blvd.
Quakertown, PA 18951

Appendix C

QUICK QG GROUP

June 18, 1991

Ralph Edgar Group Inc.
218 N. Ninth Street
Allentown, Penna. 18102

Attn: Deborah Harry, CCIM

Re: Hill Financial Mortgage
Forest Grove Inc.
Asset #013001143

Dear Mrs. Harry,

We thank you for the meeting this morning in your office on the above mentioned project.

Hill Financial and its Board of Directors duly approved and ratified a loan to Forest Grove Inc. In the amount of $1,815,000.00 of which, $1,116,402.00 has been disbursed to date. Remaining funds to be advanced is $698,000.00.

The above mentioned loan agreement is not subject to change or further conditions.

The mortgage was not fully funded and therefore the project could not be completed. As a result the following losses were incurred by us:

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1– Loss of Rental Income (69 Pads @ $165 each) x 30 Months.	$341,550.00
2– Loss of Sales Profits (50 Homes x $5,000)	$250,000.00
Total Losses	$591,550.00

Less expenses which would have incurred on un-funded lots as follows:

1– Interest on Mortgage (7,713 x 30 Months)	$231,390.00
2– Increase in operating expenses ($800 x 30)	$ 24,000.00
Total Expenses	255,390.00
Net Income 30 Months	$ 336,160.00

Summation of Losses on entire project:

Phase I (98 Units Complete)

Phase I Income @ approx. $17,000. per Mth. x 30 Mths.	$ 510,000.00
Phase I Expense @ $21,850. per month x 30	$655,550.00
Net Loss for 30 Months	$145,500.00

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Phase II (69 Lots – Not Funded)

Phase II Income 30 Months (From page 1)	$336,160.00
Less Phase I Loss (per above)	$145,500.00
Net loss of Profit for 30 Months (8,099/Mth)	$190,660.00

We have enclosed the other info you requested and we would appreciate another meeting with you after you have had time to review this material.

Sincerely,

s/ Ron W. Isenhart
Ron W. Isenhart
Sec./Treas.

P.S. Please note that all of the information you requested is not enclosed at this time, but will follow shortly.

Appendix C

Deborah Harry & Associates, Inc.
218 N. 9th Street
Allentown, PA 18102
(215) 432-1991
(215) 432-2520 fax

15 July, 1991

Ronald Isenhart
1045 North West Blvd.
Quakertown, PA 18951

RE: RTC Asset Management

Dear Mr. Isenhart:

Since my last meeting with you, there have been some changes in my ability to service your loan workout needs with the RTC. My employer, Ralph Edgar Group, Inc., has been terminated as a contractor for the RTC, leaving my subcontract with Ralph Edgar Group also invalid.

While I do not agree with RTC's reasons or decision to terminate their contracts with REG, it is not something I have any control over. At this time I want to assure you that your account will be assigned to another contractor soon, and, hopefully, I will be able to resume my duties with the new contractor.

In the meantime, all information and correspondence is being promptly forwarded to RTC. Merrill Freedman, the oversight manager for the portfolio, can be reached at (215) 631-4789.

In the event I am not successful in retaining this assignment with the new contractor, I want you to know I am available for private

consultation; and, in any event, wish you the best in working out your loan requirements.

If you have any questions or I can be of further help at any time, I'll be glad to hear from you.

Best Regards,

s/ Deborah E. Harry
Deborah E. Harry, CCIM
(215) 432-1777

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MEETING OF THE BOARD OF DIRECTORS

A meeting of the Board of Directors of Hill Financial Savings Association was held at the home office of the Association on the above date, with the following members in attendance: E.J. Bitting, R.B. Walker, C.F. Keck, T.H. Benner, C.R. Gochnaur, H.H. Bitting, V.G. Sommers, A.J. Lutz, Jr., and J.E. Weikert. Also in attendance were H.W. Longacre, Chairman of the Eastern Regional Area Advisory Board and D.F. Volk, Treasurer.

The meeting was called to order at 1:00 p.m. by Chairman Walker.

Upon motion duly made, seconded, and carried, the Minutes of the following meetings as distributed were acknowledged and approved:

Meeting of the Board of Directors held on August 14, 1986;
Meeting of the Executive Committee held on August 14, 1986;
Meeting of the Executive Committee held on September 4, 1986;
Meeting of the Central Regional Area Advisory Board held on August 19, 1986;
Meeting of the Eastern Regional Area Advisory Board held on September 4, 1986;
Meeting of the Advertising Committee held on September 10, 1986.

Chairman Walker presented the financial report for the period ending August 31, 1986. Said report covered Comparative

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Statement of Condition; Comparative Operating Statement; Comparative Budget; Breakdown of Savings (both by Branch and by Type); and Breakdown of Mortgages (both by Branch and by Type). Upon motion duly made, seconded, and carried, the Board approved the reports as presented. (See Supplemental Minute Book, Page 991)

Chairman Walker presented a review of the Investment (including Maturities, Purchases and Sales, Reverse Repurchases, Mortgage-Backed Securities, Summary of Deferred Gains and Losses on Sales of Mortgages and Mortgage-Backed Securities for the month of August, 1986. Upon motion duly made, seconded, and carried, the Board acknowledged the Report of Investments as presented. (See Supplemental Minute Book, Page 992)

Chairman Walker presented a Report setting forth new and renewed advances from the Federal Home Loan Bank of Pittsburgh during the month of August, 1986. Upon motion duly made, seconded, and carried, the Board acknowledged the report of the Federal Home Loan Bank of Pittsburgh's advances as presented. (See Supplemental Minute Book, Page 993)

Chairman Walker reviewed with the Board the Federal Home Loan Bank Quarterly Financial Report for the period June 30, 1985 through June 30, 1986, as well as the Gap Analysis as of June 30, 1986 for Hill Financial Savings Association.

Chairman Walker presented an accounting of properties sold and distribution on the Estate of David A. Swinehart as of August 31, 1986.

President Lutz reviewed with the Board the Savings Interest Rates as September 9, 1986.

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Upon motion duly made, seconded, and carried, the Board acknowledged receipt of and ratified the following loans:

Hill Financial - August, 1986

Residential Loans, Hill Financial
Other Loans, Central Region
Other Loans, Eastern Region
Purchases, Hill Financial
Consumer Loans, Central Region
Consumer Loans, Eastern Region
Student & Parent Loans, Hill Financial
Interest Rate Modifications, Central Region
Interest Rate Modifications, Eastern Region

President Lutz reported on Jumbo Certificates for Hill Financial Savings Association as of August 31, 1986. There is a total of 748 accounts, amounting to $144,922,666.79. Weighted average is 7.164%. (See Jumbo Certificate Book Page 135, for breakdown)

Chairman Walker reported that the 60 day delinquency for Hill Financial Savings Association for the month of August, 1986, is 4.50%, a decrease of .17 basis points from the month of July, 1986. (4.67%)

President Lutz presented the Foreclosure Activity Report for August, 1986, for the Association, setting forth the foreclosures instituted and foreclosure actions withdrawn during the month. Upon motion duly made, seconded, and carried, the Board acknowledged the report of foreclosures activity as prepared by the respective Foreclosure Committee. (For summary see Supplemental Minute Book, Page 994)

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President Lutz presented the Real Estate Owned Activity Report for August, 1986, for the Association. Upon motion duly made, seconded, and carried, the Board acknowledged the report of real estate owned activity as prepared by the respective Real Estate Owned Committees. (For summary see Supplemental Minute Book, Page 995)

President Lutz reported on Delinquent Loans for Hill Financial Savings Association as of August 30, 1986. Detailed reports are maintained by the Delinquent Loan Departments.

Upon motion duly made, seconded, and carried, the Board approved paying interest at the rate of 5 1/2% per annum to all accounts entitled to receive interest at the regular passbook rate to December 31, 1986; interest on certificate accounts and 90-day notice accounts and interest bearing checking accounts is to be distributed in accordance with the rates and terms specified by prior Board action.

President Lutz discussed and presented the Savings Rules of Class Manual. A substantial 'review of the manual has been completed, and some editorial changes and some corrections were made to various savings classes. No change in policy was addressed. The Rules of Class were retyped to present the most correct version of the product.

Upon motion duly made, seconded, and carried, the Board authorized management to proceed to swap approximately $100,000,000.00 of 15 and 30 year mortgages for securities with either FHLMC or FNMA at a negotiated guarantor fee.

Chairman Walker informed the Board that the merger between Hill Financial Savings Association and Fermanagh

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Building and Loan Association has been approved by the Commonwealth of Pennsylvania and the Federal Home Loan Bank of Pittsburgh with an anticipated effective date of the merger for October 1, 1986. He also stated that cosmetic repairs would be made to the office in Mifflintown.

Chairman Walker reviewed with the Board action taken by the Executive Committee with regard to the Allendale Apartments located in Allentown, Lehigh Valley, Pennsylvania. This is a participation loan with Merchants Bank in which we have a 23.4375% interest. The lead lender and participants have been trying to resolve this matter over a long period of time with the final resolve being that we accept a discounted payoff at the rate of 23.10% indicating a write off to us on our portion of the loan of $274,691.70. We have a reserve set up on our books in the amount of $287,084.13. The net affect to us will be a minor recognition of profit at the time of payoff. An additional condition of this payoff is that we participate to the extent of 23.4375% in a $300,000 line of credit to Allendale Apartments with the personal guaranty of Berel Altman.

It was reported that we have a loan request from FORREST GROVE, INC. We currently have six (6) loans totalling $26,171,730.51 less undisbursed funds of $16,610,434.94 leaving a balance of $9,561,295.57 in which one or more of these principals are involved. Upon motion duly made, seconded, and carried, the Board approved granting a permanent loan to *FORREST GROVE, INC.*, Hartley, Kent County, Delaware, with the personal guaranty of ROBERT QUICK, WILLIAM DOUGHERTY, RONALD ISENHART, and their respective spouses, in the amount of $1,815,000.00 covering manufactured mobile home park containing: Section I, 50 fully developed lots; Section II, 48 partially developed lots; Section III, 69

undeveloped lots with a total of 43.42 acres located in Hartly, Kent County, Delaware, with a maximum $660,000.00 to be released at the time of settlement. Interest rate to be thirteen and one-fourth percent (13 1/4%) for the first five (5) years and six and one-half percent (6 1/2%) above the Five-Year Treasury yield (rounded to the nearest one-fourth percent {1/4%}) for the second five (5) years or thirteen and one-fourth percent (13 1/4%), whichever is greater, for a term of ten (10) years with a twenty-five (25) year amortization, subject to a fee of three percent (3%). Loan to value 64.9%.

It was reported that we have a loan request from CANNONGATE ASSOCIATES. We currently have seven (7) loans totalling $28,456,361.95 less undisbursed funds of $13,220,391.07 leaving a balance of $15,235,970.88 in which one or more of these principals are involved. Upon motion duly made, seconded, and carried, the Board approved granting a commercial loan to *CANNONGATE ASSOCIATES*, Orlando, Florida, with the personal guaranty of EDITH R. FRIEDMAN, ROGER D. FRIEDMAN, JOEL STRYKER, CHARLES C. STURGES, & DANIEL A. LeJEUNE, in the amount of $3,060,000.00 covering 104 acre site containing an 18 hole golf course and 234 proposed rental apartment units located in Orlando, Orange County, Florida. Interest rate to be Morgan Guaranty Bank & Trust published prime plus two percent (2%) with a floor of thirteen percent (13%), for a term of twenty-four (24) months, subject to a fee of three percent (3%).

It was reported that we have a loan request from THE BASILE COMPANIES Douglasville, Pennsylvania. We currently have seven (7) loans and commitments totalling $15,433,331.76 plus undisbursed funds and unsettled commitments in the amount of $31,091,009.50 for a balance of

$46,524,341.26 in which these principals are involved. Upon motion duly made, seconded, and carried, the Board approved granting a loan in the amount of 10,237,500.00 to *WOODGATE,* with the personal guaranty of ROBERT BASILE, ERNEST BASILE, & DONALD BASILE, to the extent of 10% of the loan with the option to convert to a $375,000.00 cash pledge covering 85 existing and 128 proposed apartment units located at Neversink Road, Exeter Township, Berks County, Pennsylvania. Interest rate to be Morgan Guaranty Bank & Trust published prime plus one and one-half percent (1 1/2%) with a floor of twelve percent (12%), for a term of thirteen (13) years subject to a two and one-fourth percent (2 1/4%) fee at settlement and a one and one-fourth percent (1 1/4%) annual maintenance fee. Loan to value 75%. This loan is a residential construction loan. The Basile Companies will pledge $240,000.00 in cash to guarantee construction and rent up to 85%.

Upon motion duly made, seconded, and carried, the Board approved granting a commercial loan in the amount of $3,412,500.00 to *WOODGATE.* with the personal guaranty of ROBERT BASILE, ERNEST BASILE, & DONALD BASILE, to the extent of 10% of the loan with the option to convert to a $125,000.00 cash pledge, covering 85 existing and 128 proposed apartment units located at Neversink Road, Exeter Township, Berks County, Pennsylvania. Interest rate to be Morgan Guaranty Bank & Trust published prime plus one and one-half percent (1 1/2%) with a floor of twelve percent (12%) for a term of thirteen (13) years, subject to a two and one-fourth percent (2 1/4%) fee at settlement and a one and one-fourth percent (1 1/4%) annual maintenance fee. Loan to value 100%. This loan is a commercial loan and will entitle Hill Financial to a 50% profit participation.

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The above two (2) loans are being made to collateralize a previously approved letter of credit in the amount of $13,650,000.00.

Upon motion duly made, seconded, and carried, the Board approved granting a loan in the amount of $12,637,500 to *CHESTER HEIGHTS ASSOCIATES,* with the personal guaranty of ROBERT BASILE, ERNEST BASILE & DONALD BASILE, to the extent of 10% of the loan with the option to convert to a $375,000.00 cash pledge, covering 242 proposed apartment units located in Chester Heights Borough, Delaware County, Pennsylvania. Interest rate to be Morgan Guaranty Bank & Trust published prime plus one and one-half percent (1 1/2%) with a floor of twelve percent (12%), for a term of thirteen (13) years, subject to a fee of two and one-fourth percent (2 1/4%) at settlement and a one and one-fourth percent (1 1/4%) annual maintenance fee. Loan to value is 75%. This loan is a residential construction loan. The Basile Companies will pledge $300,000.00 in cash to guarantee construction and rent up to 85%.

Upon motion duly made, seconded, and carried, the Board approved granting a commercial loan in the amount of $4,212,500.00 to *CHESTER HEIGHTS ASSOCIATES,* with the personal guaranty of ROBERT BASILE, ERNEST BASILE & DONALD BASILE, to the extent of 10% of the loan with the option to convert to a $125,000.00 cash pledge, covering 242 proposed apartment units located in Chester Heights Borough, Delaware County, Pennsylvania. Interest rate to be Morgan Guaranty Bank & Trust published prime plus one and one-half percent (1 1/2%) with a floor of twelve percent (12%), for a term of thirteen (13) years, subject to a fee of two and one-fourth percent (2 1/4%) at settlement and a one and one-fourth percent

(1 1/4%) annual maintenance fee. Loan to value is 100%. This loan is a commercial loan and will entitle Hill Financial to a 50% profit participation.

The above two (2) loans are being made to collateralize a previously approved letter of credit in the amount of $16,850,000.00.

It was reported that we have a loan request from *REALITIES. INC.* We currently have eleven (11) loans totalling $64,397,000.00 less undisbursed funds of $15,848,232.61 leaving a balance of $48,548,767.39 in which one or more of these principals are involved. Upon motion duly made, seconded, and carried, the Board approved granting an interim commercial loan to REALITIES, INC., Denver, Colorado, with the personal guaranty of ALLAN S. REIVER & ROBERT O. ANDERSON, in the amount of $2,600,000.00 covering the FASHION BAR BUILDING, 695 South Broadway, Denver, Colorado. Interest rate to be fixed at eleven percent (11%) for a term of one hundred twenty (120) days, subject to a fee of one percent (1%). Loan to value is 80%.

Upon motion duly made, seconded, and carried, the Board approved granting an interim loan to *REALITIES, INC.*, Denver, Colorado, in the amount of $1,000,000.00 covering the second deed of trust on the INTERNATIONAL COLLECTIONS BUILDING, South Broadway, Denver, Colorado. Interest rate to be fixed at eleven percent (11%) for a term of ninety (90) days, subject to a fee of one percent (1%). Loan to value is 57%.

Harold Bitting, Chairman of the Audit Committee, reported that the Audit Committee met with the external auditors on Monday, September 8, 1986. He indicated the Audit Committee

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reviewed the audited financial statements, the auditors' letter to management and management's reply to the management letter. He also indicated that numerous questions were directed to the auditors, all of which were answered favorably. The auditors commented on the improvement in the staffing of the Internal Audit Department. Each Director was given a folder containing the audited financial report, management letter, management's response and a copy of the minutes of the Audit Committee Meeting.

A general discussion followed the report of the Audit Committee with one of the major topics being the concern of the Board regarding the need for additional depth of senior management. Other topics discussed were borrowing limitations, loan to one borrowers and the question of stock conversion. It was decided that a Special Meeting of the Board of Directors should be held to discuss these matters on Monday, September 29, 1986, at 1:00 P.M.

The next regular meeting of the Board of Directors is scheduled for Monday, October 20, 1986 at 1:00 P.M.

There being no further business, the meeting was adjourned.

s/ C.F. Keck
C. F. Keck, Secretary

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400 Main Street P.0. Box 426, Red Hill, PA 18076
215-679-3131 or 679-9506

HILL FINANCIAL™

October 1, 1986
Robert Quick, William Dougherty and Ronald Isenhart
1045 North West End Boulevard
Quakertown, PA 18951

Re: Manufactured Home Park containing 167 spaces on 43.42 acres, Hartly, Kent County, Delaware (k/a Forrest Grove, Inc.)

Dear Messrs. Quick, Dougherty and Isenhart:

This letter will confirm that your loan request on the above property has been approved subject to the following terms and conditions:

1. Loan - $1,815,000.00 (a maximum of $660,000.00 to be released at settlement). The balance is to be escrowed and disbursed as spaces are completed and leased up to achieve the ' "stabilized value".

2. Interest rate – 13 1/4% the 1st 5 years. The second 5 years to be at 6 1/2% above the 5 yr. U. S. Treasury Yield (rounded to the nearest 1/4%), or 13 1/4%, whichever is the greater.

3. Term – 10 years with a 25 year amortization.

4. Fees – 3% of loan amount ($54,450.00)

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5. Prepayment penalty - 6 months interest (at the stated rate) on the amount of prepayment during the first 5 years. There is to be no prepayment penalty during the first six (6) months after the initial 5 year period. Thereafter, the six (6) months interest prepayment penalty will again prevail.

6. Assumption clause prohibiting transfer of ownership or any part thereof without prior written approval of the lender.

7. Title Insurance will be required by a company approved by the lender. Endorsements 100, 300 and 710 will be required.

8. Loan to value not to exceed 75% loan to value at any time.

9. Personal endorsement by the principals and their spouses. This is to be Messrs. Quick, Dougherty, Isenhart and their respective spouses.

10. Completion of an application, credit report and receipt of financial and income statements on the principals, satisfactory to the lender. We will need Social Security Numbers for all principals and spouses.

11. Financial/Income statements on the principals and mortgaged property to be submitted annually.

12. Real Estate Taxes and Insurance – to be paid monthly with the principal and interest payment, and deposited in a non-interest bearing escrow account.

13. Security Agreement and Financing Statement securing any chattels.

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14. Leases used are to be presented to the lender for approval.

15. We will require an engineer's report on the water/sewer system, which report must be satisfactory to the lender.

16. Receipt of a list of present tenants and their rental fees, as well as any delinquent tenant information.

17. Proof of liability insurance covering the loan is to remain in effect for the term of the loan.

18. Evidence of fire insurance coverage on the buildings subject to fire damage, naming the lender as mortgagee.

19. Proof from the municipal authorities that the manufactured home park is in compliance with their laws and regulations, and that there is municipal approval for the proposed expansion.

20. It is our understanding the property will be titled in the corporation name of Forrest Grove, Inc. We will need to know who the corporation officers are as well as a corporation authorization to make the loan.

21. Receipt of a copy of the sales agreement.

22. Disbursement of escrowed funds are subject to inspection by the lender. The borrower is responsible for the inspection fee.

23. Loan documents to be prepared by lender's attorney, which costs are the responsibility of the borrowers.

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24. We will require an addendum to the appraisal stating the "as is" value.

25. Execution of an affidavit of existing loans with Hill Financial S.A.

If the terms and conditions of this commitment are satisfactory, please sign, date and return a copy of this letter within 15 days of the date of this letter, along with $2,000.00 as a non-refundable commitment fee, which will be applied as a credit to the loan fee if settlement is consummated

If the above conditions are met, we will hold this commitment open until December 15, 1986, after which time the commitment shall, at lender's option, be null and void.

Sincerely,

HILL FINANCIAL SAVINGS ASSOCIATION

s/ G.A. Overholtz
G. A. Overholtz
Vice President

GAO/mw

ACCEPTED: s/ Ron W. Isenhart DATE: 10/15/86

ACCEPTED: s/ William Dougherty DATE: 10/15/86

ACCEPTED: s/ Robert W. Quick DATE: 10/115/86

APPENDIX D —FEDERAL RULES OF CIVIL PROCEDURE

Rule 60. Relief From Judgment or Order

* * *

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based as been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Appendix D

* * *

CONFESSION OF JUDGMENT FOR MONEY

* * *

RULE 2951. METHODS OF PROCEEDING

(a) The prothonotary shall enter judgment by confession on a note, bond or other instrument confessing judgment or authorizing confession by an attorney at law or other person against the person who executed it in favor of the original holder or, unless expressly forbidden in the instrument, in favor of the assignee or other transferee, upon filing of the instrument and a certificate of residence of the plaintiff and of the defendant, without the agency of an attorney and without the filing of a complaint, for the amount which may appear to be due from the instrument. The judgment may include interest computable from the instrument.

* * *

(b) If judgment by confession is authorized by the instrument but may not be entered by the prothonotary under subdivision (a), an action shall be commenced by filing with the prothonotary a complaint substantially in the form provided by Rule 2952. Even though the instrument is one on which judgment could be entered by the prothonotary under subdivision (a), the plaintiff may proceed under this subdivision.

* * *

(c) The action must be brought under subdivision (b) if

(1) the instrument is more than ten years old or

(2) the original cannot be produced for filing or

(3) it requires the occurrence of a default or condition precedent before judgment may be entered, the occurrence of which cannot be ascertained from the instrument itself, or

(4) the computation of the amount due requires consideration of matters outside the instrument.

(d) If the instrument is more than twenty (20) years old, judgment may be entered only by leave of court after notice and the filing of a complaint under Subdivision (b).

(e) When the plaintiff proceeds under Subdivision (b) and the original or a photostatic copy or like reproduction of the instrument showing the defendant's signature is not attached to the complaint, judgment may be entered only by leave of court after notice.

* * *

RULE 2952. COMPLAINT, CONTENTS

The complaint shall contain the following:

(a) the names and last known addresses of the parties;

(b) the original or a photostatic copy or like reproduction of the instrument showing the defendant's signature; if the original is not attached, an averment that the copy attached is a true and correct reproduction of the original; if neither the original nor a

reproduction can be attached, an explanation why they are not available;

(c) a statement of any assignment of the instrument;

(d) either a statement that judgment has not been entered on the instrument in any jurisdiction or if it has been entered an identification of the proceedings;

* * *

(e) if the judgment may be entered only after a default or the occurrence of a condition precedent, an averment of the default or of the occurrence of the condition precedent;

(f) an itemized computation of the amount then due, based on matters outside the instrument if necessary, which may include interest and attorney's fees authorized by the instrument;

(g) a demand for judgment as authorized by the warrant;

* * *

(h) if the instrument is more than twenty (20) years old, or if the original or a photostatic copy or like reproduction of the instrument showing the defendant's signature is not attached to the complaint, an application for a court order granting leave to enter judgment after notice;

* * *

(i) signature and verification in accordance with the rules relating to a civil action.

(j) The complaint shall neither contain a notice to defend nor be endorsed with a notice to plead, and no responsive pleading shall be required whether or not the complaint contains a notice to defend or is endorsed with a notice to plead.

* * *

RULE 2959. STRIKING OFF OR OPENING JUDGMENT, PLEADINGS, PROCEDURE

(a) Relief from a judgment by confession shall be sought by petition. All grounds for relief, whether to strike off the judgment or to open it, must be asserted in a single petition. The petition may be filed in the county in which the judgment was originally entered, in any county to which the judgment has been transferred or in any other county in which the sheriff has received a writ of execution directed to him to enforce the judgment.

(b) If the petition states prima facie grounds for relief the court shall issue a rule to show cause and may grant a stay of proceedings. After being served with a copy of the petition the plaintiff shall file an answer on or before the return day of the rule. The return day of the rule shall be fixed by the court by local rule or special order.

(c) A party waives all defenses and objections which he does not include in his petition or answer.

(d) The petition and the rule to show cause and the answer shall be served as provided in Rule 440.

(e) The court shall dispose of the rule on petition and answer, and on any testimony, depositions, admissions and other

evidence. The court for cause shown may stay proceedings on the petition insofar as it seeks to open the judgment pending disposition of the application to strike off the judgment. If evidence is produced which in a jury trial would require the issues to be submitted to the jury the court shall open the judgment.

(f) The lien of the judgment or of any levy or attachment shall be preserved while the proceedings to strike off or open the judgment are pending.

* * *

Supreme Court, U.S.
FILED
DEC 22 1994
OFFICE OF THE CLERK

(2)

No. 94-946

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FOREST GROVE, INC., *et al.*,

Petitioners,

v.

RTC MORTGAGE TRUST 1994 - S5,
successor in interest to the
Resolution Trust Corporation
as Receiver for
Hill Financial Savings Association,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF OF RESPONDENT IN OPPOSITION

James S. Crockett, Jr.
(Counsel of Record)
Claudia T. Salomon
Mays & Valentine
1111 East Main Street
Richmond, Virginia 23208-1122
(804) 697-1200

Attorneys for RTC Mortgage Trust 1994 - S5, successor in interest to the Resolution Trust Corporation as Receiver for Hill Financial, Savings Association

Balmar Legal Publishing Services, Washington, DC (202) 682-9800

16 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Supreme Court should consider a case asking that the Court of Appeals for the Third Circuit apply state law when a) the Court of Appeals' decision was based on state law, and b) the parties conceded that the result was the same under either state law or federal common law?

2. Whether the Supreme Court should consider what remedy should be afforded one of the Petitioners when that issue will be decided for the first time by the district court on remand?

3. Whether the grounds and procedure for setting aside a judgment under Rule 60(b) in an action based on federal question jurisdiction are governed by federal law?

RULE 29.1 STATEMENT

The Resolution Trust Corporation ("RTC"), was established as a mixed ownership government corporation. The RTC is deemed to be an agency of the United States for purposes of subchapter II of chapter 5 and chapter 7 of title 5 of the United States Code when it is acting as a corporation. The RTC, when it is acting as a conservator or receiver of an insured depository institution, is deemed to be an agency of the United States to the same extent as the Federal Deposit Insurance Corporation ("FDIC") when the FDIC is acting as a conservator or receiver of an insured institution. With respect to this matter, the RTC was acting as receiver of Hill Financial Savings Association, an insured depository institution. The RTC has no parent or subsidiary corporations.

RTC, as receiver or conservator of various financial institutions, delivered certain assets from those institutions, including the assets at issue in this case, into RTC Mortgage Trust 1994 - S5, a Delaware business trust ("RTC Trust"). RTC Trust then sold securities evidencing ownership interests in the Trust. RTC Trust delivered the sale proceeds, as well as certain subordinate securities, to the RTC as payment for the assets transferred to RTC Trust. RTC Trust has no parent or subsidiary organizations other than as described above.

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RULE INVOLVED

Rule 60. Relief From Judgment or Order.

(b) *Mistakes: Inadvertence: Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

No. 94-946

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FOREST GROVE, INC., *et al.*,

Petitioners,

v.

RTC MORTGAGE TRUST 1994 - S5,
successor in interest to the
Resolution Trust Corporation
as Receiver for
Hill Financial Savings Association,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF OF RESPONDENT IN OPPOSITION

Respondent RTC Mortgage Trust 1994 - S5, successor in interest to Resolution Trust Corporation ("RTC") as Receiver for Hill Financial Savings Association ("Hill Financial"),[1] opposes the petition of Forest Grove, Inc., Ron Isenhart, and Delores A. Isenhart (collectively, "Petitioners") for a writ of certiorari (the "Petition"). Because the decision of the Third

[1] As explained in the foregoing Rule 29.1 Statement and in RTC's motion for substitution of parties, this asset was conveyed by RTC to RTC Mortgage Trust 1994 - S5, a Delaware business trust. To avoid confusion, RTC Mortgage Trust 1994 - S5 will be referred to in this brief as "RTC".

Circuit was correctly decided upon state law, a writ of certiorari should not issue.

I. COUNTERSTATEMENT OF THE CASE

Petitioners' Statement of the Case, while accurately depicting the procedural history of the case, recites factual matters rejected by both the district court and the court of appeals and, perhaps more importantly, misstates the ruling of the Third Circuit, from which this review is sought. Therefore, RTC offers this Counterstatement of the Case.

Hill Financial is a failed thrift, which, since October 12, 1989, has been in RTC receivership. App. at 10a.[2] In 1986, Petitioner Forest Grove, Inc. ("Forest Grove"), sought a loan of $1,815,000.00 from Hill Financial to finance the construction of a mobile home park. App. at 5a. Hill Financial eventually approved the loan and advanced $1,210,000.00 to Forest Grove before ceasing advances under the loan.

Under the terms of Hill Financial's commitment letter to Forest Grove (the "Commitment Letter"), Petitioners Ronald Isenhart and Delores Isenhart (respectively, "Mr. and Mrs. Isenhart") were required to guarantee the loan and to execute documents including, *inter alia*, confessions of judgments. Forest Grove also executed a confession of judgment. While Mr. Isenhart executed his own confession of judgment, Mrs. Isenhart's agreement was executed by Mr. Isenhart under the authority of a "General Power of Attorney" signed by Mrs. Isenhart on the same day. *See* App. at 6a-9a.

Forest Grove failed to make the monthly payments due under the loan in 1989, and on February 2, 1990, RTC declared the loan in default. On November 20, 1992, RTC filed a complaint in the United States District Court for the Eastern District of Pennsylvania to confess judgment against the Peti-

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[2] Citations to "App." refer to the Petitioners' Appendix.

tioners. The district court entered judgment by confession against the Petitioners on November 25, 1992. App. at 10a.

On January 12, 1993, Petitioners filed a motion, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, seeking relief from the confession of judgment against them. The district court denied the motion, and Petitioners' appealed to the United States Court of Appeals for the Third Circuit. App. at 11a. The Third Circuit ultimately affirmed the district court as to Forest Grove and Mr. Isenhart. With respect to Mrs. Isenhart, the court of appeals reversed the district court's order refusing to open the judgment against her and remanded the case to the district court for further proceedings consistent with the court of appeals' opinion. App. at 26a.

II. SUMMARY OF THE ARGUMENT

Contrary to Petitioners' statements, the Third Circuit did not decide this appeal under federal common law. In fact, the Third Circuit expressly declined to decide on that basis. After Petitioners *conceded* that the result would be the same under Pennsylvania law and federal common law — a concession with which the Third Circuit explicitly concurred — the court of appeals based its affirmance as to Forest Grove and Mr. Isenhart entirely on Pennsylvania law.

Mrs. Isenhart, although prevailing on her appeal, complains that the judgment against her should be "stricken" and not "opened." This result, she argues, also is compelled by Pennsylvania law. The court of appeals did not reach this issue, and the relief to be accorded Mrs. Isenhart must be determined by the district court on remand. In all events, the relief available under Rule 60(b) is governed entirely by federal law.

III. REASONS FOR DENYING THE WRIT

A. The issues raised by the Petitioners are not presented by the record in this case

1. The Petitioners conceded in the court of appeals that the choice of laws issue raised in the Petition is immaterial.

The Petition is dedicated to the argument that, following *O'Melveny & Myers v. Federal Deposit Insurance Corp.*, 114 S. Ct. 2048 (1994), the court of appeals should have held that Pennsylvania law, rather than the Federal Rules of Civil Procedure, should govern Petitioners' Rule 60(b) motion. Irrespective of the merits of this argument in the abstract, Petitioners' argument is not presented by the record in this case. The Third Circuit explicitly did not reach the issue of which law to apply, stating instead that:

> there are two reasons why it is unnecessary for us to reach that legal question here. First, *both parties concede* that the result is the same under either Pennsylvania or federal common law and the district court relied alternately on Pennsylvania and federal law in concluding that the Isenharts' and Forest Grove's defense of failure of consideration was not meritorious.

App. 18a-19a (emphasis added). The court of appeals then emphasized this point, by stating, "We once again conclude that the question of applicable law is immaterial." App. 20a n.5.

Thus, not only did the court of appeals fail to reach the issue presented by the Petition, it avoided that issue because the Petitioners conceded that the choice of law issue was not material. Having conceded that the result is the same under both federal common law and Pennsylvania law, Petitioners should not be allowed to withdraw that concession and argue that (1) the issue should have been reached by the court of appeals and (2) the resolution of the issue was outcome determinative.

2. The court of appeals relied solely on state law and evidentiary rulings to affirm the district court's decision.

After noting the conceded lack of relevance in choosing between Pennsylvania law and federal common law to decide the issues on appeal, the Third Circuit rested its affirmance solely on Pennsylvania law. The court of appeals reviewed both the language of the Commitment Letter and the evidence presented to the district court. Based on this review, the Third Circuit found both as a factual and a legal matter that the Petitioners' failure of consideration defense was insufficient to avoid the confessed judgment against them. Having so concluded, the court of appeals declared:

> Because we decide [Petitioners'] claim on this ground, we do not reach the question of whether the district court correctly held that *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) precluded them from asserting a lack of consideration as a defense to the confession of judgment.

App. at 22a n.6.

The decision of the Third Circuit, therefore, was grounded uniquely on the facts of this case as they related to Pennsylvania law. Before analyzing Petitioners' arguments, the court of appeals noted its agreement with the parties' concession that "the question of applicable law is immaterial." App. at 20a n.5. Citing cases solely from the Pennsylvania state courts to describe the defense of failure of consideration, the court of appeals found the requisite consideration in the defunct thrift's "promise to lend money to Forest Grove, a corporation the Isenharts owned . . . ." App. at 21a (citing *Miners' State Bank v. Auksztokalnis*, 128 A. 726, 728 (Pa. 1925)).

To summarize, the Third Circuit did not reject Pennsylvania state law in favor of federal common law to decide this

appeal. If anything, the opposite is closer to the truth. The court of appeals, agreeing with Petitioners' concession that the choice was irrelevant, grounded its decision solely on Pennsylvania law. Petitioners' dissatisfaction, therefore, is not with the Third Circuit's choice of law, but rather with its interpretation of Pennsylvania law. That dispute, however, does not merit review by writ of certiorari, and the Petitioners' failure to address the issue accurately in the Petition reflects their concurrence with that assessment.

B. Mrs. Isenhart's separate argument is both meritless and premature.

Mrs. Isenhart, who prevailed in the Third Circuit, also seeks review by certiorari, contending that the confessed judgment against her should, according to Pennsylvania law, be stricken *ab initio*, rather than opened. This argument is predicated on both a misconception of the applicable law and a misreading of the Third Circuit's ruling. As shown below, the nature of the remedy afforded by Rule 60(b) is entirely a creature of federal law. More importantly, perhaps, no court has yet decided what remedy will be afforded to Mrs. Isenhart.

1. The court of appeals correctly held that federal law determines the grounds for setting aside a judgment.

Rule 60(b) sets forth the bases upon which a district court can grant relief from a judgment. Since 1965, this Court has held that matters covered by the Federal Rules of Civil Procedure are governed by those rules. See, *Hanna v. Plumer*, 380 U.S. 460, 471, 85 S. Ct. 1136, 1144 (1965) ("When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided Erie choice: the court has been instructed to apply the Federal Rule"). "The grounds and procedure for setting aside a federal judgment are entirely a matter of federal law, on which state law may be disregarded." Wright, Miller & Cooper, Federal Practice and

Procedure: Jurisdiction § 2853. In holding the Federal Rules apply in determining whether to open or strike a confessed judgment, the court of appeals followed the precedent of this Court.

2. The court of appeals did not decide what remedy will be available to Mrs. Isenhart.

The Third Circuit did not declare that the confessed judgment against Mrs. Isenhart would be "opened," or "striken." The court of appeals agreed with Mrs. Isenhart that the confessed judgment was taken improperly and ordered that

> [t]he district court's order refusing to open the judgment confessed against Mrs. Isenhart will be reversed and the case will be remanded to the district court for further proceedings consistent with this opinion.

App. at 26a. Thus, the remedy to be afforded Mrs. Isenhart will be determined by the district court on remand in a manner "consistent with the [Third Circuit's] opinion." Because the distinction now argued by Mrs. Isenhart is not even addressed in the Third Circuit's opinion, the remedy to be afforded will be considered for the first time by the district court on remand. Review by this Court at this time, therefore, is premature and improvident.

C. No conflict exists in the circuits on the issue presented by this Petition.

The Petition incorrectly asserts that the decision of the Third Circuit conflicts with "every other Circuit Court to address the issue." Pet. at 8. Petitioners lists four cases citing *O'Melveny & Myers* for the proposition that state rules of decision normally should be controlling on issues asserted by the RTC and the FDIC and relating to the merits of causes of action created by state law. As already shown above, the Third Circuit followed Pennsylvania law to decide the claims of Forest

Grove and Mr. Isenhart. Consequently, the *O'Melveny & Myers* issue was not decided against these Petitioners.

Neither do the cases cited by Petitioners conflict with the Third Circuit's disposition of Mrs. Isenhart's claim. If the issue of the remedy to be afforded Mrs. Isenhart is reached, the cases offered by Petitioners do not conflict with the proposition that federal law is controlling. In fact, not one of these cases involves the interpretation and application of the Federal Rules of Civil Procedure. *See, Resolution Trust Corporation v. Maplewood Investments*, 31 F.3d 1276 (4th Cir. 1994) (holding that, under *O'Melveny & Myers*, Virginia law is followed to determine whether a holder can be a holder in due course of a nonnegotiable note); *Federal Deposit Insurance Corp. v. Massingill*, 30 F.3d 601 (5th Cir. 1994) (state law followed to determine whether co-maker of note may assert impairment of collateral defense);[3] *Federal Deposit Insurance Corp. v. Oldenburg*, 34 F.3d 1529 (10th Cir. 1994) (state law followed to determine liability on fidelity bond for losses allegedly caused by fraud and breach of contract by former officers and directors); *Resolution Trust Corp. v. Artley*, 28 F.3d 1099 (11th Cir. 1994) (state law determines whether adverse domination may be used to toll state statute of limitations applicable to state law claims of negligence and breach of contract).

Not only does the Third Circuit's opinion not conflict with the other circuits, all of the courts of appeals agree that the

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[3] Although *Massingill* is irrelevant to the rules of decision to be applied in interpreting and implementing the Federal Rules of Civil Procedure, that case is relevant to the Petition in another manner. *Massingill* was written in response to a petition for rehearing. The defendant in *Massingill* failed to brief and argue in the issue of whether state law or federal law controlled in his original appeal, and, ultimately the court of appeals refused to "entertain those thorny questions presented for the first time in appell[ant's] petition for rehearing." 30 F.3d at 605 (quoting *Holley v. Seminole County School Dist.*, 763 F.2d 399, 401 (5th Cir. 1985)). Likewise, because Petitioners conceded the irrelevancy of this point in the court of appeals, the issue should not be considered now.

grounds and procedure for setting aside a federal judgment is a matter of federal law. *See*, e.g. *Wiedemann v. Galiano*, 722 F.2d 335, 337 (7th Cir. 1983); *Johnson Chem. Co. v. Condado Center, Inc.*, 453 F.2d 1044 (1st Cir. 1972); *Vassos v. Societa Trans-Oceanica Canopus, S.A.*, 272 F.2d 182 (2nd Cir. 1959), *cert. denied*, 363 U.S. 935. 80 S.Ct. 756 (1959). Thus, on the issue presented by Petitioners, no conflict exists among the circuits or with any previous decision of this Court.

IV. CONCLUSION

For the reasons stated above, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit Should be denied.

Respectfully submitted,

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